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In the

Supreme Court of the United States

OCTOBER TERM, 1970

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

APPENDIX A. Proceedings in the U. S. District Court for the Northern District of Illinois, Eastern Division in the case of Roger Boshes, et al. v. General Motors Corporation, No. 68C-1454

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

"MOTIONS FOR SUCCESSIVE ALTERNATIVE ORDERS TO TREAT CIVIL RULE 22 IN SUBSTANTIAL EFFECT AS AN INJUNCTION, AND TO MODIFY OR DISSOLVE SUCH INJUNCTION, AND FOR OTHER RELIEF; OR TO DECLARE SAID CIVIL RULE 22 NULL AND VOID; OR TO EXPUNGE SAID CIVIL RULE 22"

Come now plaintiffs and move the Court in successive alternative order:

First, To construe and treat Civil Rule 22 of this Court adopted April 15, 1970, insofar as applied to this case as being in substantial effect an injunction, and to modify and dissolve such injunction so as to declare and establish the

right of, and to permit and authorize plaintiffs and/or their counsel to make communications concerning this action with certain potential or actual class members, to-wit: the several States of the United States, through their respective Attorneys General, who are not formal parties to this action, without subjecting such communications to prior censorship by the Court, and without subjecting such communications to the prior entry by the Court of any order approving such communications; and without subjecting such communications to subsequent disclosures to the Court and/or counsel, except for good cause shown, or (if that relief be denied,)

Second, To declare said Civil Rule 22 null and void; for violation of the First Amendment to the U. S. Constitution and as being beyond the rule-making powers of this Court or (if that relief be denied,)

Third, To expunge Civil Rule 22 of this Court for violation of the First Amendment to the U. S. Constitution and as being beyond the rule-making powers of this Court.

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By .....

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

MEMORANDUM IN SUPPORT OF MOTION FOR SUCCESSIVE ALTERNATIVE ORDERS, ETC.

I.

CIVIL RULE 22 IS IN SUBSTANTIAL EFFECT AN INJUNCTION.

U.S. v. *Cities Service Co.*, 410 F.2d 662, 663, Note 1.
Hotel, etc. Union, etc. v. *Del Valle*, 328 F.2d 885
McCoy v. *Louisiana State Board of Education*, 345 F.2d 720

II.

CIVIL RULE 22 IS IN SUBSTANTIAL EFFECT AN INJUNCTION. IT WAS ADOPTED WITHOUT NOTICE. NEITHER THE ORDER ADOPTING IT NOR THE RULE ITSELF SET FORTH ADEQUATE REASONS FOR ITS ISSUANCE; ALL IN VIOLATION OF THE REQUIREMENTS OF RULE 65 OF THE RULES OF CIVIL PROCEDURE.

III.

CIVIL RULE 22 IS IN SUBSTANTIAL EFFECT AN INJUNCTION. THE COURT HAS NOT FOUND THE FACTS SPECIALLY, NOR STATED SEPARATELY ITS CONCLUSIONS OF LAW THEREON; ALL AS REQUIRED BY RULE 52 OF THE RULES OF CIVIL PROCEDURE.

See *Harris Truck Lines, Inc.* v. *Cherry Meat Packers, Inc.* (C.A.Ill., 1963) 313 F.2d 864.

IV.

CIVIL RULE 22 IS INCONSISTENT WITH THE RULES OF CIVIL PROCEDURE, AND IS, THEREFORE, BEYOND THE POWER OF THE DISTRICT COURT TO ADOPT UNDER RULE 83 OF THE RULES OF CIVIL PROCEDURE, AND UNDER U.S.C. TITLE 28, §2071.

(a) THE NORTHERN DISTRICT OF ILLINOIS IS THE ONLY DISTRICT WHICH HAS ADOPTED A RULE OF THE NATURE OF CIVIL RULE 22. SUCH A RULE SHOULD BE UNIFORM THROUGHOUT THE FEDERAL SYSTEM, AND THERE IS NO SPECIAL SET OF CIRCUMSTANCES UNIQUELY LOCAL TO THE NORTHERN DISTRICT OF ILLINOIS, WHICH JUSTIFIES THE ADOPTION OR MAINTENANCE OF THE RULE AS A LOCAL RULE.

See *Monarch Inc. Co. of Ohio* v. *Spach*, 281 F.2d 401 (C.A., Fla. 1960)

V.

CIVIL RULE 22 ABRIDGES THE SUBSTANTIVE RIGHTS OF PLAINTIFFS AND MEMBERS OF THEIR CLASS, CONTRARY TO U.S.C., TITLE 28, §2072.

THE RIGHT TO COMMUNICATE WITHOUT PRIOR CENSORSHIP OR RESTRAINT IS A SUBSTANTIVE RIGHT.

VI.

CIVIL RULE 22 IS IN VIOLATION OF THE FIRST AMENDMENT AS AN UNWARRANTED PRIOR RESTRAINT ON THE PLAINTIFFS' AND THEIR ATTORNEYS' FIRST AMENDMENT RIGHTS TO FREEDOM OF SPEECH, AND TO PEACEABLY ASSEMBLE TO PETITION THE GOVERNMENT FOR REDRESS OF THEIR GRIEVANCES.

Chase v. *Robson*, No. 18424, U.S. Court of Appeals, Seventh Circuit, Order for the Issuance of a Writ of Mandamus of May 1, 1970 (not reported).

VII.

THIS MOTION SHOULD BE GRANTED AND OPPORTUNITY TO CONSULT WITH OTHER MEMBERS OF THE PLAINTIFFS' CLASS SHOULD BE AFFORDED BEFORE THE COURT PASSES ON THE MOTION TO STRIKE THE COMPLAINT HERETOFORE FILED BY THE DEFENDANT HEREIN; OTHERWISE ANY ORDER ADVERSE TO THE COMPLAINT ENTERED ON SAID MOTION WILL DENY THE PLAINTIFFS AND THE OTHER MEMBERS OF THEIR CLASS DUE PROCESS OF LAW, CONTRARY TO THE FIFTH AMENDMENT.

Respectfully submitted,

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Attorneys for Plaintiffs,
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By .....

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.

No. 68 C 1454

MOTION FOR RULE 23 ORDER

Come now the plaintiffs and move the Court to determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to make such orders regarding notice to the members and alleged members of the class as may be appropriate or necessary under the Constitution, the laws, and the Rules.

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By .....

UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Judge Campbell
Cause No. 68 C 1454 Date Oct 6 1970
Title of Cause—Boshes vs General Motors
Brief Statement of Motion—Motion for Orders under Rule 23 & Rule 22 Order den

Motion for orders under Rule 22 and Rule 23 are denied
/s/ W.J.C.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

NOTICE OF APPEAL
(Filed Nov 4 1970)

NOTICE is hereby given that Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, plaintiffs herein, each in his own behalf and on behalf of all others for whom this action is brought, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order entered in this action on October 6, 1970, denying motions for successive alternative orders to treat Civil Rule 22 in substantial effect as an injunction, and to modify or dissolve such injunction, and for other

relief; or to declare said Civil Rule 22 null and void; or to expunge said Civil Rule 22.

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IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ROGER BOSHES, et al.,
Plaintiffs,
v.
GENERAL MOTORS CORPORATION,
Defendant.
No. 68 C 1454

NOTICE OF APPEAL
(Filed Nov 4 1970)

NOTICE is hereby given that Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, plaintiffs herein, each in his own behalf and on behalf of all others for whom this action is brought, hereby appeal to the United States Court of Appeals for the Seventh Circuit from the order entered in this action on October 6, 1970 denying the motion of plaintiffs that the court determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to make such orders regarding notice to the members and alleged members of the class as may be appropriate or necessary under the Constitution, the laws and the rules.

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APPENDIX B

Proceedings in the U.S. Court of Appeals for the Seventh Circuit in consolidated appeals Nos. 18939 and 18940.

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ROGER BOSHES, et al.,
Appellants,
v.
GENERAL MOTORS CORPORATION,
Appellee.
} Nos. 18939, 18940

APPELLEE'S MOTION TO DISMISS APPEALS AND MEMORANDUM IN SUPPORT THEREOF

Defendant-appellee hereby moves the Court to dismiss these appeals because the order appealed from simply deferred any ruling by the district court with respect to plaintiffs-appellants' procedural motions until such time as the legal sufficiency of the complaint was determined.

This case was brought by five automobile owners, appellants here, as a purported class action on behalf of all persons who purchased General Motors passenger cars during the four years immediately preceding the filing of the complaint, seeking to recover treble damages on the theory that defendant General Motors Corporation violated the antitrust laws by "conspiring" with itself or with or among its internal passenger car divisions in establishing the prices for new General Motors cars. General Motors filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and the final memorandum of the parties briefing that motion was filed on August 14, 1970.

Almost two months later, and while the motion to dismiss was under submission, plaintiffs filed two procedural motions. In the first, they asked that Rule 22 of the Civil Rules for the Northern District of Illinois be modified, declared null and void, or held unconstitutional. Rule 22 provides that in every class action no communication concerning the action shall be made by any of the parties or their counsel with any potential or actual class member who is not a formal party to the action, until such time as an order may be entered by the court approving the communication. Plaintiffs' motion was made apparently for the purpose of allowing them to communicate with State attorneys general without supervision of the district court. In their second motion, plaintiffs asked the district court to proceed to make the requisite class action determination under Rule 23 of the Federal Rules of Civil Procedure.

Pointing out that it had not yet ruled on the pending motion to dismiss, the district court denied plaintiffs' motions with leave to reinstate:

> "I think I would rather finish what I am doing now. Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate." (Tr. at 3-4, Oct. 6, 1970).

Since the filing of plaintiffs' notices of appeal, the district court granted defendant's motion to dismiss the complaint insofar as it purports to state a claim based on Section 1 of the Sherman Act and the so-called intra-corporate conspiracy theory. (Order, Dec. 11, 1970; copy attached hereto as Appendix A). The court also granted General Motors additional time within which to answer or otherwise plead with respect to the remaining allegations of the complaint, which consist essentially of an amendment to the complaint filed by plaintiffs on August 27, 1970. In that amendment plaintiffs allege additional violations of the

antitrust laws unrelated to their initial charge of intra-corporate conspiracy. Significantly, in granting defendant's motion to dismiss, the court below said:

> "The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Rule 23 and Local Rule 22 will be considered if and when the court concludes that plaintiffs' complaint states a claim upon which relief can be granted." (Order, Dec. 11, 1970).

In the light of the above, appellee General Motors moves this Court to dismiss the appeals on the ground that no jurisdiction exists for appellate review of an order deferring consideration of routine procedural motions or even a denial of those motions.

ARGUMENT

PLAINTIFFS-APPELLANTS' MOTIONS WERE NOT DECIDED; CONSIDERATION OF THEM WAS SIMPLY DEFERRED.

Although the district court "denied" plaintiffs' motions on October 6, 1970, it is clear that the court was not ruling on the merits of the motions or reaching any decision with respect to them. Rather, the court concluded only that it would not rule on the motions until the preliminary question of the sufficiency of the complaint was determined.* The court's subsequent order of December 11, 1970 confirms that plaintiffs' motions had not been decided and that final consideration of them was being deferred until the remaining issues of the sufficiency of the complaint were determined.

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* The district court no doubt recognized the inefficiency inherent in determining the class action issues or permitting communication with alleged class members regarding an action the court might shortly dismiss for failure to state a claim.

Appeals to this Court may be had only to review a final decision of the district court, 28 U.S.C. §1291, or to review an order granting or denying an injunction or the dissolution of an injunction, 28 U.S.C. §1292(a).** The October 6 order is plainly not a final decision under Section 1291 in any respect since it reaches neither substantive issues nor even the merits of the motions. Morover, the order is not one refusing to dissolve an injunction, as plaintiffs would apparently characterize it, but rather only a deferral of the court's consideration of the issues relevant to either dissolving or refusing to dissolve any injunctive effects of Local Rule 22.

In *Babcock & Wilcox Co.* v. *Foster Wheeler Corp.*, 415 F.2d 777 (3d Cir. 1969), the district court, in accordance with the rules of the U.S. Patent Office, denied a request for access to certain information until the appropriate stage of the proceeding was reached.* The Court of Appeals for the Third Circuit dismissed an appeal from the district court's order because it lacked sufficient finality to be appealable and noted that, as here, "the district court's order denying the motion recited that its denial was without prejudice to appellant's right to renew its motion" at an appropriate time, so that the attempted appeal merely sought "a review of the propriety of district court action which did not determine the merits of appellant's motion and which did not have the effect of prejudicing the appellant." 415 F.2d at 778.

** 28 U.S.C. §1292(b), which provides for permissive review of certain interlocutory orders, is not involved here since plaintiffs did not seek certification of the district court's order.

* Local Rule 22 is analogous to the Patent Office rule in that it restricts certain communications until an appropriate order of the district court issues.

Even in the unlikely event that Local Rule 22 should be construed to be an injunction, and the October 6 order were considered to have been a refusal to dissolve it, that refusal would not be reviewable under §1292(a)(1), which was intended to apply only to interlocutory orders temporarily granting or denying part or all of the ultimate relief sought by the complaint.** See 9 Moore, *Federal Practice* ¶110.20[1], at 233-235 (2d ed. 1970); *Stricklin* v. *Regents of the Univ. of Wisconsin*, 420 F.2d 1259, (7th Cir. 1970). For example, in *Whittle* v. *Tawes*, 343 F.2d 428 (4th Cir. 1965), which was an action against the governor of Maryland to compel him to investigate the circumstances surrounding the death of the plaintiff's brother, the defendant moved to dismiss the complaint. An order was then entered deferring the taking of depositions by the plaintiff pending disposition of the motion to dismiss. In dismissing an appeal from that order, the Court of Appeals for the Fourth Circuit explained:

> "This is a routine procedural step in the normal administration of the case and obviously not the type of order that may be reviewed before the final determination of the case, and 28 U.S.C.A. §1292(a)(1), upon which the appellant relies, is inapplicable." *Ibid.*

See also *International Prods. Corp.* v. *Koons*, 325 F.2d 403, 406 (2d Cir. 1963).

Plaintiffs-appellants here, as in *Babcock & Wilcox* and *Whittle*, seek to appeal a procedural ruling which reaches neither the merits of the underlying action nor the merits of the motions themselves. Consequently, even if the Octo-

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** Only with respect to their motion concerning Local Rule 22 can plaintiffs possibly characterize the October 6 order as one refusing to dissolve an injunction. Section 1292(a)(1) is clearly inapplicable to the deferral of plaintiffs' motion for a Rule 23 class action determination, particularly since the time for making that determination lies within the discretion of the district court.

ber 6 order were considered a "denial" rather than a deferral of their motions, the appeals should be dismissed.

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Dated: January 4, 1971

Respectfully submitted,

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UNITED STATES DISTRICT COURT

Name of Presiding Judge, Honorable Judge Campbell

Cause No. 68 C 1454 Date Dec 11 1970

Title of Cause—Roger Boshes, et al vs General Motors Corporation

Brief Statement of Motion—Order

Defts. motion to dismiss the complaint is granted insofar as the same is based on Sec. One of the Sherman Act (15 U.S.C. 51) and the theory of an inter-corporate conspiracy.

Joseph E. Seagram and Son, Inc. vs Hawaiian Oke & Liquors, Ltd., 416 F. 2nd 71 (9th Cir. 1969) *Cliff Food Store Inc. vs Kroger, Inc.*, 417 F 2nd 203 (5th Cir. 1969) In all other respects the motion to dismiss is denied. Deft. shall answer or plead to the remaining allegations to the complaint within 20 days of this date. The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 & other questions under Rule 23 and Local Rule 22 will be considered if and when the court concludes that plaintiffs complaint states a claim upon which relief can be granted. (Draft)

/s/ W.J.C.

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al., Plaintiffs-Appellants v. GENERAL MOTORS CORPORATION, Defendant-Appellee	Nos. 18939 and 18940

OBJECTIONS TO MOTION OF GENERAL MOTORS CORPORATION, DEFENDANT-APPELLEE, TO DISMISS THESE APPEALS

I.

Plaintiffs-Appellants object to General Motors Corporation's motion to dismiss these appeals. Plaintiffs-Appellants urge that the motion be denied, or perhaps preferably, that the motion be taken with the case, and considered also in connection with the Petitions for Mandamus filed concomitantly hereto (as this Court did in the Order entered by it on May 1, 1970, in No. 18424, *Chase* v. *Rob-*

son, Judge, and No. 18417, *United States* v. *Chase.*) (Not reported.)

II.

Jurisdiction of both of these appeals is asserted by plaintiffs-appellants under 28 U.S.C.A. §1291, as construed in a line of cases of which *Cohen* v. *Beneficial Industrial Loan Corp.,* 337 U.S. 541, 545, 546; 69 S.Ct. 1221, 1225, 1226; 93 L.Ed. 1528, is an exemplar.

Jurisdiction of the appeal from the order denying the motion to treat Local Rule 22 of the Rules of the United States District Court for the Northern District of Illinois as an injunction and denying the motion to modify or dissolve the injunction, is asserted further under 28 U.S.C.A. 1292(a)(1).

III.

The questions presented on the motion to dismiss are as follows:

A. With regard to Local Rule 22 of the Rules of the United States District Court for the Northern District of Illinois,

1. Whether said Local Rule 22 is in substantial effect an injunction.

2. Whether the order denying plaintiffs' motion to modify or dissolve such injunction to the end that plaintiffs and their counsel may communicate with the Attorneys General of the several States (which States and their political subdivisions are potential and actual class members):

a) Is an order which is appealable under 28 U.S.C.A. 1292 (a)(1) as an order refusing to dissolve or modify an injunction, and/or

b) Is an order which in a "practical rather than a technical sense" is "fundamental to the

further conduct of the case", "touching matters that will not affect or be affected by, the decision on the merits", "the practical effect of which "will be irreparable by any subsequent appeal", so as to be appealable under 28 U.S.C.A. §1291.

B. With regard to Rule 23(c)(1) of the Rules of Civil Procedure, whether an order denying, and/or indefinitely postponing ruling upon, a motion made in an action brought as a class action, more than two years after the commencement of the action, that the court determine by order whether it is to be so maintained, and that the court direct notice to the members of the class, is appealable under 28 U.S.C.A. 1291, as being in a "practical rather than a technical sense" "fundamental to the further conduct of the case," "touching matters that will not affect or or be affected by the decision on the merits", the practical effect of which "will be irreparable by any subsequent appeal", and "too independent of the cause itself to require that appellate consideration be deferred until the whole cause is adjudicated."

THE RULES OF COURT INVOLVED

Rule 22 of the Local Rules of the United States District Court for the Northern District of Illinois:

"Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

"Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of this Court."

Rule 23(c)(1) and (2) of the Rules of Civil Procedure for the United States District Courts:

"(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

"(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under the subdivision may be conditional, and may be altered or amended before the decision on the merits.

"(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

THE NATURE OF THE CASE

On August 6, 1968 a class action in equity was brought by the plaintiffs, Roger Boshes and four other persons who purchased General Motors passenger automobiles as consumers, on behalf of all such purchasers within the four preceding years and on behalf of subsequent purchasers, to recover money damages and costs from General Motors Corporation, for violations of Sections 1 and 2 of the Sherman Act (15 U.S.C.A. §§1 and 2) and Section 7 of the Clayton Act (15 U.S.C.A. §18), and for such other relief as might be available to the class. The class consists of some millions of persons.

The claim of liability in the original complaint for damages under Section 1 of the Sherman Act, is predicated

upon allegations that the Buick, Cadillac, Chevrolet, Oldsmobile and Pontiac Divisions of General Motors were originally independent corporations which had combined with each other into General Motors Corporation and were substantially independent business entities (see *General Motors Corp* v. *Washington,* 377 U.S. 436, 84 S.Ct. 1564), that they were in competition with each other in the market for American style cars, and that they had combined to fix prices; as a result of which General Motors charged higher prices to members of plaintiffs' class than it would have if there had been no combination to fix prices. (The question of whether a "division" is similar to a subsidiary corporation with regard to liability of the parent for a combination or conspiracy with the parent company has been presented to and noted by the Court, but not yet passed on by that Court. *Poller* v. *C.B.S.*, 368 U.S. 464, 469; 82 S.Ct. 486, 489 (Footnote 4). (See in this connection the brief filed in the District Court, Record, 150).

The claim of liability for damages under Section 2 of the Sherman Act is based upon allegations that during the period in question, General Motors Corporation as a combination of the original 5 companies had monopoly power in the relevant market; that its profits were so great that it could reduce prices to a point where all its competitors could be driven from the relevant market and yet it could still make a profit; that for the same reason it had the power to prevent new competitors from entering the relevant market; that it had attained and maintained this power by combination, conspiracy to fix prices and other unlawful acts.

The precise claims to other relief were not spelled out specifically in the pleadings, but in the briefs attention of the court was directed to the fact that a decree of divestiture under Section 7 of the Clayton Act could be appropriate under *Dupont I,* 353 U.S. 598, 77 S.Ct. 880; *Cas-*

cade Natural Gas Co. v. *El Paso Natural Gas Co.*, 87 S.Ct. 932, 937, 386 U.S. 129, 136. (See Record 154).

On October 6, 1970, Amendment No. 1 to the Complaint was filed by leave of court (Rec. 236-318). This amendment spelled out additional claimed violations of the antitrust laws arising out of the creation and maintenance by General Motors of hundreds of retail-dealership subsidiary corporations with which General Motors combined and conspired to fix retail prices, etc., which violations would justify granting relief by way of damages, and e.g., divestiture and injunction.

THE COURSE OF PROCEEDING.

Since the filing of the complaint on August 6, 1968, numerous orders of extension of time to file a responsive pleading were entered from time to time pursuant to stipulation. Ultimately, on March 23, 1970—more than 20 months after the complaint was filed—General Motors filed a motion to dismiss the complaint. (Rec. 126-127). The issues were extensively briefed by the plaintiffs and defendant, and the last brief was filed on August 14, 1970 (Rec. 209-213). (The trial judge held the motion under advisement and did not rule on it until December 14, 1970 after these appeals were taken.)

On September 28, 1970, plaintiffs filed two motions:

First, a motion that Local Rule 22 of the District Court be construed as an injunction, and to modify or dissolve the injunction so that plaintiffs might enter into communication concerning this action with the Attorneys General of the States (the States being actual or potential class members), or in the alternative, to declare Local Rule 22 void and/or expunge it as being in violation of the First Amendment and the Fifth Amendment, and beyond the rule-making powers of the District Court (Rec. 228-229).

Second, a motion for the District Court to determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to provide for appropriate notice to the alleged members of the class (Rec. 226).

Both motions were denied on October 6, 1970. (The transcript of the hearing shows that the District Judge stated that they might be renewed at an unspecified later date (Transcript October 6, 1970, pp. 3-4). This does not appear in the order of denial (Rec. 235).

On November 4, 1970, plaintiffs filed Notices of Appeal to this court from the order of October 6, 1970 denying plaintiffs' motions with regard to Local Rule 22, and Rule of Civil Procedure 23.

General Motors has obtained an extension of time to answer or plead to the "remaining allegations of the complaint" until March 3, 1971 and has as yet filed no response.

On October 6, 1970 the plaintiffs were granted leave to and did file "Amendment No. 1 to the Complaint" (Rec. 318, 236-315).

On December 14, 1970 (more than 2 months later), the District Court entered an order (Appellee's Motion to Dismiss in this Court, Appendix A) that:

a) Defendant's motion to dismiss the complaint was "granted insofar as it is based on Section 1 of the Sherman Act and the theory of intra-corporate conspiracy."

b) In all other respects the motion to dismiss was denied.

c) "Defendant shall answer or plead to the remaining allegations of the complaint."

d) "The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Local Rule 22 will be con-

sidered if and when the court concludes that plaintiff's complaint states a claim upon which relief can be granted."

THE DISPOSITION IN THE COURT BELOW.

The disposition in the court below is difficult to understand.

On October 6, 1970, the District Court entered the following categoric order (Rec. 235):

"Motions for orders under Rule 22 and Rule 23 are denied."

On November 4, 1970, plaintiffs' Notices of Appeal to this Court were filed with the District Court Clerk.

(Plaintiffs have not renewed the motions for orders under Rule 22 and Rule 23.)

On December 14, 1970, more than two months after the entry of the order of denial and more than a month after the filing of the Notices of Appeal, the District Court *sua sponte* entered the following orders:

"The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Rule 23 and Local Rule 22 will be considered if and when the Court concludes that plaintiffs' complaint states a claim upon which relief can be granted." (Appellee's Motion to Dismiss Appeals, p. 7).

But these motions were no longer before the District Court! The motions had been denied; the denials had been appealed from; and jurisdiction with relation to the motions had been transferred to this Court of Appeals by the filing of the Notices of Appeal; *and the denials appealed from still stand.*

BRIEF

PRELIMINARY REMARKS

This suit is perhaps one of the three most important antitrust cases (the other two being *Standard Oil Co. of New Jersey* v. *U.S.*, 31 S.Ct. 502, 221 U.S. 1; *United States* v. *American Tobacco Co.*, 31 S.Ct. 632, 221 U.S. 106.)

It is a class suit brought by five consumer-purchasers, asking for damages for the class in quite large amounts and for divestiture, injunction and other equitable relief. It presents many questions of first impression. Plaintiffs are pitted against the $23 Billion General Motors colossus. The suit presents many serious problems of policy and strategy. Should all possible causes of action be searched out and asserted, or should the suit be pressed only on those causes of action which can be disposed of most expeditiously? There are millions of persons who are members of the consumer-class. Many of them have already died; some millions of them will certainly be dead before this suit ends if the case takes the conventional 10-to-25 year course (see, e.g. *Gottesman* v. *General Motors Corp.*, et al., 414 F.2d 965 and still pending. *Gottesman* is based on *DuPont I*, 77 S.Ct. 872, 353 U.S. 586, which had been instituted in 1949. See also *Cascade National Gas Corporation* v. *El Paso Natural Gas Company*, 386 U.S. 129, 87 S.Ct. 932, commenced in 1957 and still pending in June, 1969. *Utah Public Service Commission* v. *El Paso Natural Gas Co.*, 89 S.Ct. 1860, 395 U.S. 464. See also *Perkins* v. *Standard Oil Co. of Cal.*, 89 S.Ct. 1871, 1875, 395 U.S. 642, 650, commenced in 1959, concluded in 1969).

The amount which might be recovered for each member of the class (or his estate) is comparatively not large, and has been and will be depreciated by the general inflation. Should plaintiffs look for a bird in the hand rather than for two in the bush? "Justice delayed is justice denied."

Questions of limitations in class suits exist, and have not yet been authoritatively settled. Did the filing of the suit toll limitations as to the members of the class? If the suit is dismissed without notice to them, and they have no knowledge of the dismissal, what are their rights?

It is with regard to the foregoing matters among others, that communication and consultation with representative members of the class is desired. The most representative members are the States, each of whom (together with its political subdivisions) is a large consumer-purchaser of automobiles from General Motors.

The object of these appeals and the mandamuses being filed concomitantly with them is to enable plaintiffs as "private attorneys general", as "representatives of the public interest" (*Flast* v. *Cohen,* 88 S.Ct. 1942, 1963, 392 U.S. 83, 120), as well as of their class, to obtain First Amendment rights of communication, assembly and petition, and the Fifth Amendment right of due process of law, for themselves and their class.

POINTS AND AUTHORITIES

A.

WITH REGARD TO LOCAL RULE 22

I.

Local Rule 22 is in substantial effect an injunction.

United States v. *Cities Service Co.,* 410 F. 2d 662, 663, footnote 1

Hotel & Restaurant Employees and Bartenders' Int'l Union etc. v. *Del Valle,* 328 F. 2d 885

McCoy v. *Louisiana State Board of Education,* 345 F. 2d 720

Independent Petroleum Workers of New Jersey v. *Esso Standard Oil Co.,* 235 F. 2d 401

II.

The order of the District Court *denying* plaintiffs' motion that Civil Rule 22 be treated as an injunction, and *denying* plaintiffs' motion that the District Court modify or dissolve such injunction so as to declare and establish the right of and to permit and authorize plaintiffs and/or their counsel, to make communications concerning this action with certain potential or actual class members, to-wit, the several states of the United States, through their respective Attorneys General, was an order denying a motion to dissolve or modify an injunction, and hence is appealable under 28 U.S.C. 1292 (a) (1).

Hyde Construction Co. v. *Koehring Co.*, 388 F. 2d 501

Rivers v. *Miller*, 112 F. 2d 439

American Grain Sep. Co. v. *Twin City Sep. Co.*, 202 F. 2d

See:

A. & E. Plastick Pak Co. v. *Monsanto Company*, 396 F. 2d 710

H. W. Caldwell & Son Co., Inc. v. *U. S. etc.*, 407 F. 2d 21

III.

The order is likewise appealable under 28 U.S.C. 1291 as an order which in a practical rather than a technical sense is fundamental to the further conduct of the case, touching matters that will not affect or be affected by, the decision on the merits, and the practical effect of which will be irreparable by any subsequent appeal.

Gillespie v. *United States Steel Corporation*, 85 S. Ct. 308, 379 U.S. 148

Cohen v. *Beneficial Industrial Loan Corporation*, 69 S. Ct. 1221, 337 U.S. 541

Chabot v. *National Securities and Research Corporation*, 290 F. 2d 657

And see:

United States v. *General Motors Corporation*, 323 U.S. 373, 377, 65 S. Ct. 357, 359

IV.

The invitations to plaintiffs by the District Court to renew at some later date their motions to modify or dissolve the Local Rule 22 injunction could not and did not deprive plaintiffs of their right to appeal.

Pan American World Airways, Inc. v. *Flight Engineers International Assn., etc.*, 306 F. 2d 840

National Mediation Board v. *Air Pilots Association, etc.*, 323 F. 2d 305

Missouri-Kansas-Texas R. Co. v. *Randolph*, 182 F. 2d 886

David v. *Hayden*, 238 F. 734

Schainman v. *Brainard*, 8 F. 2d 11

Western Union Telegraph Co. v. *United States & Mexican Trust Co.*, 221 F. 545

Boeing Co. v. *International Union, etc.*, 370 F. 2d 969

B.

WITH REGARD TO THE DENIAL OF PLAINTIFFS MOTION FOR A RULE 23 DETERMINATION BY ORDER WHETHER CLASS ACTION TO BE MAINTAINED; AND FOR NOTICE.

V.

A. Rule 23 determination as to whether the action should be maintained as a class action should be made at an early stage of the case.

Philadelphia Electric Co. v. *Anaconda American Brass Co.*, 42 F.R.D. 324

Hardy v. *U. S. Steel Corp.*, 289 F. Supp. 200

Weissman v. *M. C. A. Inc.*, 45 F.R.D. 258

Clark v. *American Marine Corp.*, 297 F. Supp. 1305

See:

Eisen v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564-565

VI.

In any event, a determination as to whether the action should be maintained as a class action, should be made before the District Court rules that the complaint is insufficient in any respect, since the rights of the absent members of the class are thereby affected.

Clark v. *American Marine Corps.*, 297 F. Supp. 1305, 1306

Eisen v. *Carlisle & Jacquelin*, 391 F. 2d 555, 564-565

Cranston v. *Freeman*, 290 F. Supp. 785, 787-788

VII.

The order refusing to make the determination under Rule 23 as to whether the action is to be maintained as a class action, and the refusal to give notice, combined with the inhibitions of Local Rule 22, and with the fact that the cause of action under Section 1 of the Sherman Act has been held not to exist, is an order which is appealable under 28 U.S.C. 1291, because in a practical rather than a technical sense it is fundamental to the further conduct of the case, touching matters that will not affect or be affected by, the decision on the merits, and the practical effect of which will be irreparable by any subsequent appeal.

Gillespie v. *United States Steel Corporation*, 85 S. Ct. 308, 376 U.S.

Cohen v. *Beneficial Industrial Loan Corporation*, 66 S. Ct. 1221, 337 U.S. 541

Chabot v. *National Securities and Research Corporation*, 292 F. 2d 657

ARGUMENT

A.

The order of November 6, 1970, denying plaintiffs' motion compelled by Local Rule 22, for leave to communicate with the States Attorneys General, was in substantion effect an interlocutory order refusing to dissolve or modify an injunction.

I.

Local Rule 22 is in substantial effect a temporary injunction. It is no different in any way, for example, from the usual and customary injunction entered in a labor case against communication by picketing, or in a covenant-against-competition case against communication with customers. It is a sweeping "general injunction", comparable with the "general warrants" which James Oatis successfully resisted. It is a part of the proceedings "in every action brought as a class action under Rule 23 of Federal Rules of Civil Procedure."

The order denying plaintiffs' motion under Local Rule 22 is an interlocutory order refusing to modify or dissolve an injunction. In determining the existence of an interlocutory order, this court will look to its substantial effect rather than its terminology.

United States v. *Cities Service Co.*, 410 F. 2d 662, 663, Footnote 1.

Hotel etc. Union v. *Del Valle*, 328 F. 2d 885

McCoy v. *Louisiana State Board of Education*, 345 F. 2d 720

Even if Local Rule 22 were claimed to be a temporary restraining order, it became tantamount to an injunction after 20 days (*National Mediation Board* v. *Air Line Pilots Association, Intern.*, 323 F. 2d 305; *Pan-American World Airways, Inc.* v. *Flight Engineering International Association, etc.*, 306 F. 2d 840), and the interlocutory order denying for the time being the motion to dissolve or modify it became appealable as an interlocutory order refusing to dissolve or modify an injunction, under 28 U.S.C. 1292 (a) (1).

(In *United States* v. *Chase*, No. 18417, not reported, in this Court in an analogous situation elected not to pass on the question of appealability, preferring to award mandamus. See order of May 1, 1970 in No. 18417, p. 5).

II.

The order denying plaintiffs leave to communicate with the States Attorneys General is appealable under 28 U.S.C. §1291.

There is a line of cases, of which *Gillespie* v. *United States Steel Corporation*, 85 S.Ct. 308, 379 U.S. 148 appears to be the latest, which allows an appeal under 28 U.S.C. §1291 from an order which is not final in the sense that the order is "not necessarily the last order possible to be made in the case."

Certain tests have been laid down in these cases:

1. *Is the order one which in a "practical rather than a technical sense" is "fundamental to the further conduct of the case?"*

We believe that the order which denies us leave to communicate with the State Attorneys General is such an order.

Plaintiffs are 5 individual automobile consumer-purchasers, suing on behalf of all consumer purchasers. They

are pitted against General Motors, a $23 billion dollar colossus. The resources of General Motors for defense are practically limitless. General Motors has persuaded the District Court to rule that no cause of action exists under Section 1 of the Sherman Act. This ruling directly affects all other members of the class (although they have not received notice or hearing). This might work a great injustice on them, since the claims for recovery for their benefit have been effectively cut off so long as the District Judge's ruling stands (*Gillespie*, 85 S. Ct. 308, 311, 379 U.S. 148, 153).

Plaintiffs desire to consult with the State Attorneys General concerning the posture of the case, and the tactics and strategy to be followed. Such consultation in a "practical rather than a technical sense" is "fundamental to the further conduct of the case." The States themselves are large consumer-purchasers, as are their municipalities; and are important members of the consumer-purchaser class. While no single State, and perhaps not all the States in conjunction, can or will marshall resources comparable to those which General Motors can, and will if so advised, pour into this struggle, thre will be at least a comparability of the litigious power which simply does not exist in the present remarkable and hitherto unheard-of situation where plaintiffs are totally barred from communicating concerning this case with probably more than half of the adults of the Nation!

There are problems of the Statute of Limitations. There are problems of selectivity of causes of action. It is noteworthy that the *DuPont-General Motors* Clayton Act litigation, bitterly fought, which commenced in 1949, and which resulted in civil litigation for damages in a derivative stockholders suit, is not yet terminated! We should like to consult with the Attorneys General of the States for the pur-

pose of developing a strategy which will avoid a possible twenty-year litigation during which millions of our consumer-class will have died.

(It should be noted that Rule 22 in no way inhibits a *defendant* from communicating with whomsoever it chooses. *We are gagged;* General Motors, directly or indirectly, can communicate with anybody!)

2. *Will the "practical effect" of denial of an appeal at this time "be irreparable by a subsequent appeal."*

The District Court has already ruled adversely to the plaintiffs' class on the "divisions" claim under Section 1 of the Sherman Act. Would it be sound strategy for plaintiffs, *at this stage of the case* to ask the trial judge for a statement under 28 U.S.C. 1292 (b) and if granted take an immediate appeal on that issue? Plaintiffs would like to consult with strong fellow class-members on this issue. Prior to the adoption of Local Rule 22 they could have done so. And the consultation must be made *now*, not before further rulings on the sufficiency of the class' claims are made. General Motors is free to consult with *anyone;* but the plaintiffs are not. If plaintiffs must wait until the final order in the case is made before they may consult, the practical effect of denial of appeal at this time will certainly be irreparable by a subsequent appeal.

3. *Is the order sought to be appealed from collateral to the principal litigation because touching matters that will not affect or be affected by decision of the merits of the case.*

That this is so, is so clear as hardly to require argument. How can our communication with the States Attorneys General affect or be affected by a decision of the merits of the case?

4. *Does a balancing of "the inconvenience and costs of piecemeal review on the one hand and the danger of denying justice by delay on the other," favor the allowance of an appeal?*

As the Supreme Court pointed out in *Gillespie* (85 S. Ct. 311; 379 U.S. 152), such a balancing is not always easy. We have previously pointed out some of the dangers of denying justice by delay, in this case. There are additional considerations which we respectfully urge upon the Court. Local Rule 22 is an innovation in the law; this Court, in its supervisory capacity over the District Court, ought to formulate guidelines concerning the rights of parties to communicate with members of their class in Rule 23 suits, which are becoming a continually increasing portion of the business of the Federal Courts. See *Schlagenhauf* v. *Holder*, 85 S. Ct. 234, 239, 379 U.S. 104, 112. Likewise, the preferred First Amendment rights of communication and of assembly to petition the government for redress of grievances; and the Fifth Amendment right of due process to the absent members of the class are involved. We respectfully submit that in this case at least, the balancing should weight in favor of allowing the appeal.

The order of November 6, 1970 denying plaintiffs' motion for a determination by the District Court pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and for appropriate notice to members of the class, is likewise appealable under 288 *U.S.C.A.* § 1291.

This proposition is perhaps more difficult of demonstration than the appealability of the Local Rule 22 order. It may be that this court will feel that mandamus is a more appropriate remedy. (We direct this court's attention to the practice in the Second Circuit, where

the Court of Appeals holds itself free to consider an appeal as a petition for mandamus or prohibition, *International Prods. Corp.* v. *Koons,* 32 F.2d 403, 407).

Yet, applying the tests for collateral appealability which we have previously set forth, the Rule 23 order would seem to meet their requirements:

1. Can there be any doubt that the order in a practical rather than a technical sense is fundamental to the further conduct of the case?

2. Plaintiffs wish to obtain at this time, for themselves and their class, the benefit of their First Amendment rights of communication and of assembly to petition the government for redress of their grievances; and to obtain for the members of their class, now, their due process rights of notice and hearings. The availability and exercise of these rights, *now, at this stage of the proceedings* is of the utmost importance. Will not the practical effect of denial of an appeal at this time be irreparable by a subsequent appeal, for reasons previously stated?

3. Is it not true that the order sought to be appealed from is collateral to the principal litigation because touching matters that will not affect or be affected by decision of the merits of the case? (The merits are, whether General Motors has or has not violated the anti-trust laws so as to have given to the plaintiffs' class claims upon which relief might be granted. Whether or not the case should for the time being proceed as a class action is a *collateral* matter to the merits, the class action involving essentially a question of convenience.)

4. If an appeal is available under Local Rule 22 order, would not the balancing of considerations result in the conclusion that in the interests of justice it would be better all around to consider in the same proceeding the propriety of the District Court's refusal to determine

whether the action should proceed as a class action, and what notice should be given?

We, therefore, respectfully urge that the motion to dismiss be denied, or be taken with the consolidated case, and with the petitions for mandamus or prohibition that are being filed as alternative procedures for relief.

Respectfully submitted,
A. Bradley Eben
Raymond I. Suekoff
Charles Liebman
Milton K. Joseph
By /s/ Charles Liebman
Charles Liebman, one of the attorneys for Plaintiffs-Appellants
120 W. Madison, Suite 800
Chicago, Ill. 60602
St. 2-1776

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

Friday, February 12, 1971

Before

Hon. OTTO KERNER, Circuit Judge
Hon. WILBUR F. PELL, JR., Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Plaintiffs-Appellants

v.

No. 18939, 18940

GENERAL MOTORS CORPORATION,
Defendant-Appellee

} Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

This matter comes before the Court on the defendant-appellee's motion to dismiss the above entitled appeals, and the objections of plaintiffs-appellants to said motion.

On consideration whereof, IT IS ORDERED and adjudged by this Court that the above entitled appeals be, and the same are hereby DISMISSED at the cost of plaintiffs-appellants on motion of defendant-appellee.

Nos. 18939 and 18940
IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al.,
Plaintiffs-Appellants
v.
GENERAL MOTORS CORPORATION,
Defendant-Appellee

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

(Filed February 25, 1971)

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE TO VACATE THE ORDER OF DISMISSAL, AND TO FILE A NEW ORDER STATING THE REASONS FOR DISMIISSAL OF THE APPEALS

The plaintiffs-appellants, with the utmost deference, most respectfully petition this Court either to grant a rehearing herein, or to vacate the order of dismissal heretofore entered herein, and to file a new order stating the reasons for dismissal of the appeals.

These plaintiffs-appellants most respectfully suggest that the lack of any reported litigation at this time relating to Local Rule 22 and to the question of the appealability of orders of refusals to determine whether actions brought as class suits shall be maintained as class suits under Rule of Civil Procedure 23 and notice given to the members of the alleged class, are cogent reasons for this Court to discuss these questions in an opinion in these appeals, in order to afford sorely needed guidance to the Dis-

trict Courts and to the Bar, in this era of proliferating class actions.

Respectfully submitted,
A. Bradley Eben
Raymond I. Suekoff
Milton K. Joseph
Charles Liebman
By /s/ Charles Liebman
Attorneys for Plaintiffs-Appellants

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, March 10, 1971

Before

Hon. Otto Kerner, Circuit Judge
Hon. John Paul Stevens, Circuit Judge
Hon. .....

Roger Boshes, et al., Plaintiffs-Appellants v. No. 18939, 18940 General Motors Corporation, Defendant-Appellee	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

IT IS HEREBY ORDERED by the Court that the petition of plaintiffs-appellants for rehearing, or, in the alternative to vacate the order of dismissal, and to file a new order stating the reasons for dismissal of the appeals, be and the same is hereby denied.

Appendix C.

Proceedings in the U.S. Court of Appeals for the Seventh Circuit in original Mandamus Action entitled *Roger Boshes, et al.* v. *Honorable William J. Campbell*, Judge, etc., No. 71-1104.

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al.,
Petitioners,
v.
HONORABLE WILLIAM J. CAMPBELL, Judge, United States District Court For The Northern District of Illinois,
No. 71-1104

(Filed Feb 5, 1971)

ORIGINAL PETITION FOR WRITS OF MANDAMUS AND PROHIBITION WITH RELATION TO AN ORDER OF DENIAL TO PETITIONERS FOR LEAVE TO COMMUNICATE WITH THE ATTORNEYS GENERAL OF THE SEVERAL STATES, WHICH ORDER HAS BEEN APPEALED FROM TO THIS COURT IN NOS. 18939 and 18940

Now comes Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor by their attorneys, A. Bradley Eben, Milton K. Joseph, Charles Liebman and Raymond I. Suekoff, and petition this court:

1. To issue a Writ of Mandamus directing the Respondent, the Honorable William J. Campbell, Judge, United States District Court for the Northern District of Illinois to vacate his order of November 6, 1970, entered in the case of *Roger Boshes, et al.* v. *General Motors Corporation*, No. 68C-1454, denying the motion of these petitioners and plaintiffs in said case for leave to communicate with the Attorneys General of the several States, which order without according the petitioners and their class due process of law impermissibly deprives these petitioners and their counsel of their First Amendment rights of freedom of

speech, and to peaceably assemble and to petition the government for a redress of their grievances.

2. To issue a rule upon the Respondent, the Honorable William J. Campbell, to show cause why a writ of prohibition should not issue to prevent him from enforcing the terms and conditions of Civil Rule 22 of District Court of the Northern District of Illinois by way of contempt proceedings or otherwise, if these petitioners and/or their counsel should communicate

(a) with the several States, who are potential or actual class members, through their respective Attorneys General: and/or

(b) With other potential or actual class members.

3. To issue its order staying proceedings in the District Court in said case No. 68C-1454, until this Court has disposed of this petition for a writ of mandamus and prohibition.

STATEMENT OF FACTS

The case below was brought on August 6, 1968, and is pending as an asserted class action, by the five plaintiffs as consumer-purchasers of General Motors automobiles, on behalf of all consumer-purchasers of General Motors automobiles within the four-year limitations period (15 U.S.C.A. §15b) as a class, to recover damages for violation by General Motors Corporation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

The plaintiffs are ordinary, average individuals of average means and resources. It is the policy of the law that they are "private attorneys general", acting in the public interest, as well as privately. *Flast* v. *Cohen*, 88 S.Ct. 1942, 1957, 1963, 392 U.S. 83, 109, 120; *Scripps-Howard Radio* v. *Federal Communications Commission*, 316 U.S. 4, 14; 62 S.Ct. 875, 882.

The book value of General Motors' net worth is approximately $10 Billion. Its working capital is over $4 Billion. The present market value of its common stock is over $23 Billion.

The filing of the suit below as a class suit tolled the four-year statute of limitations as to the members of the class. *Union Carbide* v. *Nisley*, 300 F.2d 561. *Esplin* v. *Hinchi*, 402 F.2d 94, cert. den. 89 S.Ct. 1194, 394 U.S. 928, 22 L.Ed. 2nd 459. There seems to be no statutory or case law as to the effect on the class with regard to limitations of a determination by the court below (a) that there is no cause of action for damages, (b) that the case may not be maintained as a class action.

Counsel for plaintiffs desire to consult with other responsible members of the class with regard to the preservation of the rights of the class in the proceeding below. They are prohibited from doing so under pain of contempt and professional discipline by Local Rule 22 of the court below which reads as follows:

> For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

On September 28, 1970, plaintiffs made application to the court below for leave to communicate with the Attorneys General of the several States as actual or potential class members, as follows:

MOTIONS FOR SUCCESSIVE ALTERNATIVE ORDERS TO TREAT CIVIL RULE 22 IN SUBSTANTIAL EFFECT AS AN INJUNCTION, AND TO MODIFY OR DISSOLVE SUCH INJUNCTION, AND FOR OTHER RELIEF; OR TO DECLARE SAID CIVIL RULE 22 NULL AND VOID: OR TO EXPUNGE SAID CIVIL RULE 22

Come now plaintiffs and move the Court in successive alternative order:

First, To construe and treat Civil Rule 22 of this Court adopted April 15, 1970, insofar as applied to this case as being in substantial effect an injunction, and to modify and dissolve such injunction so as to declare and establish the right of, and to permit and authorize plaintiffs and/or their counsel to make communications concerning this action with certain potential or actual class members, to-wit: the several States of the United States, through their respective Attorneys General, who are not formal parties to this action, without subjecting such communications to prior censorship by the Court, and without subjecting such communications to the prior entry by the Court of any order approving such communications; and without subjecting such communications to subsequent disclosures to the Court and/or counsel, except for good cause shown, or (if that relief be denied,)

Second, To declare said Civil Rule 22 null and void; for violation of the First Amendment to the U.S. Constitution and as being beyond the rule-making powers of this Court or (if that relief be denied,)

Third, To expunge Civil Rule 22 of this Court for violation of the First Amendment to the U.S. Constitution and as being beyond the rule-making powers of this Court.

On October 6, 1970, the Respondent entered the following order:

Motion for orders under Rule 22 and Rule 23 denied

In the colloquy in connection with the order the Respondent stated:

> "Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate."

Subsequently, on December 11, 1970, the Respondent entered an order dismissing the complaint insofar as it purports to state a claim based on Section 1 of the Sherman Act and the theory of an intra-corporate conspiracy; and in the same order stated:

> "The motion . . . seeking a determination . . . under . . . Local Rule 22 will be considered if and when the Court concludes that plaintiffs' complaint states a claim upon which relief can be granted."

It would be totally irrational for plaintiffs to pursue their claims except in a class action.

They will not pursue their claims as individuals, but *only* as members of the class.

Plaintiffs then appealed to this Court from the order of denial, which appeal is now pending (Nos. 18939 and 19840, Consolidated).

It being uncertain whether appeal or mandamus prohibition is the proper remedy, plaintiffs below now bring this petition for mandamus and prohibition. This proceeding is a companion proceeding to Appeals Nos. 18939 and 18940, and petitioners ask that it be consolidated with these said appeals, or heard together with them.

REASONS WHY THE WRITS SHOULD ISSUE

We would like to be able to say that Local Rule 22 is a novelty in jurisprudence, but it is analogous to the order entered by the Honorable Edwin A. Robson, Judge, in *U.S.* v. *Chase* (No. 18417 on appeal in this court), on February 24, 1970, which this Court ordered vacated in a mandamus prohibition proceeding in No. 18424, *Chase* v. *Robson.* (Order, May 1, 1970.)

Local Rule 22 is afflicted with all the infirmities noted by this Court in *Chase* v. *Robson,* No. 18424, supra.

It was entered *sua sponte* by the District Court.

It is a limitation on Petitioners' and their attorneys exercise of First Amendment rights of freedom of speech (and of their right peaceably to assemble and petition the judicial branch of the government for redress of grievances).

It is a denial of the due process rights to notice and hearing, of the members of petitioners' class.

Local Rule 22 does not contain or refer to any findings whatsoever establishing that communication between plaintiffs and actual or potential class members constitutes a serious and imminent threat to the administration of justice, or a reasonable likelihood of a serious threat to the administration of justice.

The order of October 6, 1970, denying plaintiffs leave to communicate with the Attorneys General of the several States likewise contains no such findings.

Therefore, both Local Rule 22 and the order of October 6, 1970 denying plaintiffs leave to communicate with the Attorneys General are constitutionally impermissible (Order of this Court, May 1, 1970, in No. 18424, *Chase* v. *Robson,* p. 3.

In addition, Local Rule 22 as written and as applied in the order of October 6, 1970 is constitutionally over-

broad. The Rule absolutely prohibits all communication, including communication which will not have an effect on the administration of justice along with speech which will have such an effect. The order of November 6 does the same. (See Order of this Court, May 1, 1970, in No. 18424, *Chase* v. *Robson*, pp. 4-5).

Local Rule 22 and the order of October 6, 1970 impose a prior restraint on protected First Amendment conduct. They are unrelated to the merits of the case, and wrongs caused by them may not effectively be redressed by an ultimate appeal on the merits.

Only immediate action on this Court's part can adequately eliminate the threatened constraints of free speech imposed by the order of November 6, 1970. Local Rule 22 and the order of November 6, 1970 have a chilling effect on free speech, and plaintiffs should not be forced to assert their invalidity in a contempt proceeding.

Local Rule 22 and the order of November 6, 1970 denying the right to communicate with the Attorneys General of the several States constitute a clear abuse of discretion, and are a proper subject for mandamus. (See order of this Court, May 1, 1970 in No. 18424, *Chase* v. *Robson*, p. 5.)

(Although we have not made all the Judges of the District Court parties to this proceeding, we respectfully direct this Court's attention to the fact that it has supervisory power over the rules of the District Court, and has the right to use mandamus to bar the operation of a void rule or one inconsistent with the rules of the United States Supreme Court. *Sanders* v. *Russell*, 40 F.2d 241, 244.)

We respectfully direct the Court's attention to the language of the Supreme Court in *Brotherhood of Railroad Trainmen* v. *Virginia*, 84 S.Ct. 1113, 1116, 377 U.S. 1, 5-6.

"It cannot be seriously doubted that the First

Amendment's guarantees of free speech, petition and assembly give railroad workers the right *to gather together for the lawful purpose of helping and advising one another* in asserting the rights Congress gave them in the Safety Appliance Act and the Federal Employees Liability Act, *a statutory right which would be vain and futile if the workers could not talk together freely as to the best course to follow.*" (Emphasis supplied.)

The District Court, in the absence of notice to the other members of the class, has already tentatively determined that the suit should be dismissed as far as Section 1 of the Sherman Act is concerned. The rights of the other members of the class should not be so abruptly foreclosed, without notice and an opportunity for hearing. "Equal justice under law" as the touchstone of American justice should not give so over-whelming an advantage to General Motors, the $23 billion dollar colossus.

PRAYER FOR RELIEF

Wherefore, the petitioners Roger Boshes, et al. pray that this Court:

1. Issue a writ of mandamus directing the Respondent, the Honorable William Campbell, to vacate his order of October 6, 1970 issued in the case of *Boshes, et al.* v. *General Motors*, No. 68C 1454, denying their motion for leave to communicate with the Attorneys General of the several States, Local Rule 22 *non obstante;* and imposing limitations upon the freedom of speech, of assembly, and of petition, of the petitioners and their counsel; and denying the members of petitioners' class due process rights of notice and hearing.

2. Issue a rule upon the Respondent, the Honorable William J. Campbell, to show cause why a writ of prohibition should not issue to prevent him from enforcing Local

Rule 22, at least insofar as communication between these petitioners and their counsel, and the Attorneys General of the several States are concerned.

3. Issue its order staying the proceedings in the trial court until this Court has determined the validity of such order on consideration of this petition or on the direct appeal taken from such order.

4. *Sua sponte,* in the exercise of its supervisory jurisdiction over the rule-making power of the District Courts, and its attention having been directed to Local Rule 22, hold Local Rule 22 unconstitutional for violation of the First Amendment and the due process clause of the Fifth Amendment, and for being inconsistent with the Rules of Civil Procedure of the Supreme Court.

5. Make such other order as may be appropriate to vindicate the First Amendment and Fifth Amendment rights of plaintiffs and the members of their class.

A. Bradley Eben,
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Chicago, Ill. 60602
Milton K. Joseph
Charles Liebman
Raymond I. Suekoff
120 W. Madison St.
Chicago, Ill. 60602
Tel. 368-4433

By /s/ .....
Charles Liebman,
Attorneys for Petitioners

State of Illinois)
County of Cook) SS.

Charles Liebman, being first duly sworn, on oath says that he is one of the counsel for petitioners herein; and that the allegations of fact in said petition contained are true.

.....

Charles Liebman

One of the attorneys for petitioners herein.

Subscribed and sworn to before me this
..... day of February, 1971.

.....

Notary Public

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Friday, February 12, 1971

Before

ROGER BOSHES, et al.,
Petitioners,

No. 71-1104

v.

HONORABLE WILLIAM J. CAMPBELL,
United States District Judge, etc.,
Respondent.

This matter comes before the Court on the original petition of Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor for writs of mandamus and prohibition with relation to an order of denial to petitioners for leave to communicate with the Attorneys General of the several states, which order has been appealed from to this Court in Nos. 18939 and 18940.

On consideration whereof, It Is Ordered and adjudged by this Court that the said original petition for writs of mandamus and prohibition be, and the same is hereby, Denied.

A True Copy:
Teste:
/s/ Kenneth J. Cormick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
By /s/ H. K. McCormack
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al.,
Petitioners,
v.
HONORABLE WILLIAM J. CAMPBELL, United States District Judge, etc.,
Respondent.

No. 71-1104
Petition for Writ of Mandamus or Prohibition

(Filed February 25, 1971)

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE TO VACATE THE ORDER OF DENIAL, AND TO FILE A NEW ORDER STATING THE REASONS FOR THE DENIAL OF THE PETITION FOR MANDAMUS

The petitioners, with the utmost deference, most respectfully petition this Court, either to grant a rehearing herein, or to vacate the order of denial heretofore entered herein, and to file a new order stating the reasons for denial of the petition for mandamus.

These petitioners most respectfully suggest that the lack *of any reported litigation at this time relating to Local Rule* 22 is a cogent reason for this Court to discuss the ques-

tions raised in this mandamus with regard to Local Rule 22, in an opinion, in order to afford sorely needed guidance to the District Courts and to the Bar, in this era of proliferating class actions.

Respectfully submitted
A. Bradley Eben
Raymond I. Suekoff
Milton J. Joseph
Charles Liebman
By .....
Attorneys for Petitioners

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Thursday, April 8, 1971.
Before
Hon. OTTO KERNER, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Petitioners,
No. 71-1104
v.
HONORABLE WILLIAM J. CAMPBELL, United States District Judge, etc.,
Respondent.
} Petition for Writ of Mandamus or Prohibition

It Is Hereby Ordered by the Court that the petition for rehearing or in the alternative to vacate the order of denial filed herein on February 25, 1971, be and the same is hereby denied.

APPENDIX D

Proceedings in the U.S. Court of Appeals for the Seventh Circuit in original Mandamus action entitled *Roger Boshes, et al.* v. *Honorable William J. Campbell,* Judge, etc., No. 71-1122.

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, *et al.*,
Petitioners

v.

HONORABLE WILLIAM J. CAMPBELL, Judge, United States District Court for the Northern District of Illinois,
Respondent

No. 71-1122

ORIGINAL PETITION FOR WRITS OF MANDAMUS AND/OR PROHIBITION WITH RELATION TO AN ORDER DENYING A MOTION UNDER RULE 23 OF THE RULES OF CIVIL PROCEDURE, FOR THE COURT BELOW TO DETERMINE WHETHER AN ACTION IS TO BE MAINTAINED AS A CLASS ACTION, AND FOR NOTICE TO THE MEMBERS OF THE CLASS, WHICH ORDER AS BEEN APPEALED FROM TO THIS COURT IN NOS. 18939 and 18940.

Now come Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, by their attorneys, A. Bradley Eben, Milton K. Joseph, Charles Liebman and Raymond I. Suekoff, and petition this court:

1. To issue a Writ of Mandamus directing the Respondent, the Honorable William J. Campbell, Judge, United States District Court for the Northern District of Illinois to vacate his order of November 6, 1970, entered in the case of *Roger Boshes, et al.* v. *General Motors Corporation*, No. 68C-1454, denying the motion of petitioners as plaintiffs in said case, which motion was made more than two years after the commencement of said case, that the court determine whether the action be maintained as a class action; and denying the motion made by these

petitioners as plaintiffs below as aforesaid, for notice to members of the class.

2. To issue a rule upon the Respondent, the Honorable William J. Campbell, to show cause why a writ of prohibition should not issue to prevent him from proceeding with the case below, and particularly with ruling upon the sufficiency of the complaint as amended below, until said Respondent shall have determined whether the case below shall be maintained as a class action, and until after the best notice practicable under the circumstances shall have been given to the class.

3. To issue its order staying proceedings in the District Court in said case No. 68C-1454, until this Court has disposed of this petition for a writ of mandamus and prohibition.

STATEMENT OF FACTS

The case below was brought on August 6, 1968, and is pending as an asserted class action, by the five plaintiffs as consumer-purchasers of General Motors automobiles, on behalf of all consumer-purchasers of General Motors automobiles within the four-year limitations period (15 U.S. C.A. § 15b) as a class, to recover damages for violation by General Motors Corporation of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, and for other appropriate relief.

The plaintiffs are ordinary, average individuals of average means and resources. It is the policy of the law that they are "private attorneys general", acting in the public interest, as well as privately. *Flast* v. *Cohen,* 88 S.Ct. 1942, 1957, 1963; 382 U.S. 83, 109, 120; *Scripps-Howard Radio* v. *Federal Communications Commission,* 316 U.S. 4, 15; 62 S.Ct. 875, 882.

The book value of General Motors' net worth is approximately $10 Billion. Its working capital is over $4 Billion.

The present market value of its common stock is over $23 Billion.

The filing of the suit below as a class suit tolled the four-year statute of limitations as to the members of the class. *Union Carbide* v. *Nisley*, 300 F.2d 561. *Esplin* v. *Hinchi*, 402 F.2d 94, Cert.den. 89 S.Ct. 1194; 394 U.S. 928; 22 L.Ed.2d 459. There seems to be no statutory or case law as to the effect on the class with regard to limitations of a determination by the court below (a) that there is no cause of action for damages; (b) that the case may not be maintained as a class action.

On March 23, 1970, defendant General Motors filed its motion to dismiss the complaint. The motion was taken under advisement by the District Judge, and while said motion of defendant to dismiss the complaint remained pending and undisposed of, plaintiffs on September 25, 1970 filed a motion for Rule 23 orders in words and figures as follows, to-wit:

"MOTION FOR RULE 23 ORDER

"Come now the plaintiffs and move the court to determine by order pursuant to Rule 23 of the Rules of Civil Procedure that this action is to be maintained as a class action, and to make such orders regarding notice to the members and alleged members of the class as may be appropriate or necessary under the Constitution, the laws, and the Rules."

This motion was based on Rule 23(c)(1) of the Rules of Civil Procedure for the United States District Courts, which reads as follows:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and

may be altered or amended before the decision on the merits."

This motion was further based on the First Amendment rights of freedom of communication and of assembly to petition the government for redress of grievances, and the Fifth Amendment right to due process of law, to be vindicated at this stage of the proceeding by affording appropriate notice and an opportunity for hearing to the members of plaintiffs' class.

It was the wish and purpose of plaintiffs as part of doing a conscientious job in representing the class to consult with other representative members of the class with regard to their position under the pending motion to dismiss, and with regard to the action to be taken thereunder.

On October 6, 1970, the Respondent, the Honorable William J. Campbell, denied the said motion, and entered an order in words and figures as follows, to-wit:

"Motion for orders under Rule 22 and Rule 23 denied."

In the colloquy in connection with the order, Respondent, the Honorable William J. Campbell, stated:

"Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate."

Subsequently, on December 11, 1970, the Respondent entered an order dismissing the complaint insofar as it purports to state a claim based on Section 1 of the Sherman Act and the theory of an intra-corporate conspiracy; and in the same order stated:

"The motion . . . seeking a determination that this is a proper class action brought pursuant to Rule 23, and other questions under Rule 23 . . . will be considered if and when the court concludes that plaintiffs' complaint states a claim upon which relief can be granted."

Plaintiffs then appealed to this Court from the order of denial, which appeal is now pending (Nos. 18939 and 18940, Consolidated).

It being uncertain whether appeal or mandamus/prohibition is the proper remedy, plaintiffs below now bring this petition for mandamus and prohibition.

REASONS WHY THE WRIT SHOULD ISSUE.

I.

Because of the small amount which might be recovered by the plaintiffs individually, it would be totally irrational for plaintiffs to pursue their claims except as a class action. *Eisen* v. *Carlisle & Jacquelin,* 391 F.2d 555, 566-567.

They will not pursue their claims as individuals, but only as members of the class, and on behalf of the class.

To permit General Motors to contest liability with each consumer-purchaser in a single, separate suit would give General Motors an advantage which would be equivalent to closing the door of justice to all small claimants. This is what the class suit practice was intended to prevent.

Weeks v. *Bareco Oil Co.,* 125 F.2d 84, 90

Hohmann v. *Packard Instrument Co.,* 399 F.2d 711,715.

The interlocutory order entered on December 11, 1970 finding no claim stated under Section 1 of the Sherman Act was adverse to the class. It was made without a finding that "extensive publicity has been given the case", or that the case has been given "widespread notoriety". See *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927,931. No members of the class other than the plaintiffs had received a "full, accurate and complete description of the pending action." Compare *Schy* v. *Susquehanna Corporation,* 419 F.2d 1112, 1116.

II.

The District Court may not refuse to allow appellants to represent the class until they have proved their own right to relief. *Johnson* v. *Georgia Highway Express, Inc.* 417 F.2d 1122, 1124-1125.

The determination as to whether a class action should be maintained should be made and notice should be given at early stages of the litigation, particularly where other actions may be barred by the Statute of Limitations. *Green* v. *Wolf Corporation,* 406 F.2d 291, 298. See *Hale* v. *Ralston Purina Co.,* 432 F.2d 156.

Rule 23(c)(1) says that "*as soon as practicable* after the commencement of an action brought as a class action, the court *shall* determine by order whether it is to be so maintained". (Emphasis supplied.) An order under this subdivision may be conditional and may be altered or amended before decision on the merits.

The underlined language is significant. It implies a sense of urgency. *The District Court is not to wait until it determines that a cause of action exists. Kahn* v. *Rosenstiel,* 424 F.2d 161, 169.

It is not to wait until the District Court determines whether the complaint states a claim upon which relief might be granted, as the Respondent seems to have thought. Sections (a) and (b) of Rule 23, which detail the prerequisites of "representative parties on behalf of all" do not require "that the complaint state a claim upon which relief may be granted" as one of the prerequisites.

There is no question that there are millions of consumer-purchasers of cars whose position is identical to that of plaintiffs. There is no question that among these consumer-purchasers are the several States and their political subdivisions (State highway patrol cars, municipality police cars, cars for officials and public agency pools, etc.).

There is no question that General Motors is a $23 billion dollar corporation, whose resources to resist this suit are for all practical purposes limitless. There is no question that more than 2½ years have now passed since the filing of the suit.

It is perfectly practicable at this time for the District Court to determine by order whether this suit is to be maintained as a class suit. The wording of Rule 23(c)(1) is mandatory; the Rule uses the word "shall". See *Johnson* v. *City of Baton Rouge, La.*, 14 F.R.S.2d p. 737.

We respectfully direct this Court's attention to the fact that we ask no more in this mandamus proceeding than that the District Court *make a determination* at this time; we do not ask this Court to tell the District Court what the determination shall be (although we think it is clear that the determination must be in our favor).

We respectfully submit that, in the light of the wording of the rule, *the indefinite postponement of ruling on a request to make such a determination* constitutes an abuse of discretion, remediable by mandamus in this court. *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 480; *Shutte* v. *Armco Steel Corp.* 431 F.2d 22; *Harper and Row Publishers, Inc.* v. *Decker*, 423 F.2d 487.

We also respectfully submit that in view of the serious question of the Statute of Limitations, as it may affect the members of the class who have no knowledge of the proceedings, due process requirements under the Fifth Amendment require that some kind of reasonable notice of the proceedings be given to the class at this stage, regardless of Rule 23(c)(2). *Clark* v. *American Marine Corp.*, 297 F. Supp. 1305.

Finally, we note that in the most recently reported cases, the Rule 23(c)(1) determination has been made at an early stage of the proceedings. *Gerstle* v. *Continental Airlines,*

14 Fed. Rules Service 2d 342; *Turnoff* v. *Nederlandsch, etc.*, 14 Fed. Rules Service 2d 408; *Cusack* v. *Nederlandsch, etc.*, 14 Fed. Rules Service 2d 415; *Philadelphia Electric Co.* v. *Anaconda America Brass Co.*, 42 F.R.D. 324; *Hurdy* v. *U.S. Steel Corporation*, 289 F.Supp. 200; *Weisman* v. *MCA, Inc.*, 45 F.R.D.559.

PRAYER FOR RELIEF

Wherefore, the petitioners, Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor, pray that this court:

1. Issue a writ of mandamus directing the Respondent, the Honorable William J. Campbell, to determine whether the action below, namely, the case of *Boshes, et al*, v. *General Motors Corporation*, No. 68C-1454, be maintained as a class suit.

2. Issue a writ of mandamus directing the Respondent, the Honorable William J. Campbell to direct appropriate notice to the members of the class or to representative members thereof in vindication of their Fifth Amendment due process rights, of the pendency of these proceedings, and the nature thereof.

3. Issue its order staying the proceedings in the trial court until this Court has determined whether the writ of mandamus or either of them prayed for in paragraphs 1 and 2 next above shall issue.

4. Make such other order as may be appropriate to vindicate the First Amendment and Fifth Amendment rights of plaintiffs and the members of their class.

Respectfully submitted,
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1 N. LaSalle St.
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Milton K. Joseph
Charles Liebman
Raymond I. Suekoff
120 W. Madison St.
Chicago, Ill. 60602
By /s/ Raymond I. Suekoff
Attorneys for Petitioners

STATE OF ILLINOIS)
COUNTY OF COOK) SS.

Raymond I. Suekoff, being first duly sworn, on oath says that he is one of the counsel for petitioners herein and that the allegations of fact in said petition contained are true.

/s/ Raymond I. Suekoff

Subscribed and sworn to before me
this 11th day of February, 1971.
/s/ Nancy Fitzgerald
Notory Public

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Friday, February 26, 1971
Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. OTTO KERNER, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Petitioners,
v.
No. 71-1122
HONORABLE WILLIAM J. CAMPBELL, Judge
United States District Court,
Respondent.

Original Petition for Writ of Mandamus.

This matter comes before the Court on the original petition of Roger Boshes, Esther K. Roerig, Curtis Collum, Frank Jackson and James Taylor for writs of mandamus and/or prohibition with relation to an order denying a motion under Rule 23 of the Rules of Civil Procedure, for the Court below to determine whether an action is to be maintained as a class action, and for notice to the members of the class, which order has been appealed from to this Court in Nos. 18939 and 18940.

On consideration whereof, It Is Ordered and adjudged by this Court that the said original petition for writs of mandamus and/or prohibition be, and the same is hereby, denied.

A True Copy:
Teste:
/s/ Kenneth J. Carrick
Clerk of the United States
Court of Appeals for the
Seventh Circuit.
By /s/ H. K. McCormack
Deputy Clerk

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ROGER BOSHES, et al., Petitioners, v. HONORABLE WILLIAM J. CAMPBELL, United States District Judge, etc., Respondent.	No. 71-1122 Petition for Writ of Mandamus or Prohibition

PETITION FOR REHEARING, OR, IN THE ALTERNATIVE, TO VACATE THE ORDER OF DENIAL, AND TO FILE A NEW ORDER STATING THE REASONS FOR THE DENIAL OF THE PETITION FOR MANDAMUS.

(Filed March 11, 1971)

These petitioners most respectfully petition this Court, either to grant a rehearing herein, or to vacate the order of denial heretofore entered herein, and to file a new order stating the reasons for denial of the petition for mandamus.

These petitioners most respectfully suggest that the precedents cited in the Petition for Mandamus, together with the wording of Rule of Civil Procedure, 23 (c)(1): ". . . as soon as practicable . . .," indicate that the District Court may have deviated from the established practice, which is that determination as to whether a class action should be mentioned, should be made early in the proceedings, and are cogent reasons for this Court to discuss in an opinion the questions raised in this mandamus with regard to Rule of Civil Procedure 23 (c)(1), in order to

afford sorely needed guidance to the District Courts and to the Bar, in this era of proliferating class actions.

Respectfully submitted,
A. Bradley Eben
Raymond I. Suekoff
Milton K. Joseph
Charles Liebman
Attorneys for Petitioners
By /s/ Raymond I. Suekoff

IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

Tuesday, March 16, 1971

Before
Hon. LUTHER M. SWYGERT, Chief Judge
Hon. OTTO KERNER, Circuit Judge
Hon. JOHN PAUL STEVENS, Circuit Judge

ROGER BOSHES, et al.,
Petitioners,
No. 71-1122
v.
HONORABLE WILLIAM J. CAMPBELL, Judge
United States District Court,
Respondent.
} Original Petition for Writ of Mandamus.

This matter comes before the Court on petitioners' petition for rehearing, or, in the alternative, to vacate the order of denial, and to file a new order stating the reasons for the denial of the petition for mandamus.

On consideration whereof, the Court being fully advised in the premises,

It Is Ordered that said petition be and the same is hereby denied.

Respectfully submitted,

ANTHONY BRADLEY EBEN
MILTON K. JOSEPH
CHARLES LIEBMAN
RAYMOND I. SUEKOFF
Attorneys for Petitioners

70-244

No. ~~1788-1~~

Supreme Court, U.S.
FILED
JUN 7 1971
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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The Scheffer Press, Inc.—ANdover 3-6850

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,

Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review three judgments of the United States Court of Appeals for the Seventh Circuit, entered respectively on February 12, 1971 (Consolidated Appeals Nos. 18939-18940 below) (App. 37a), on February 12, 1971 (Mandamus No. 71-1104 below) (App. 49a), and on February 26, 1971 (Mandamus No. 71-1122 below) (App. 61a), which involve identical and closely related questions. A single petition for writ of certiorari covering all the cases suffices. Rule 23(j)(5), Rules of the Supreme Court of the United States.

Opinion.

The Court of Appeals did not file an opinion in any of the three cases sought to be reviewed herein.

The District Court for the Northern District of Illinois likewise did not file any opinion.

JURISDICTION

1. Consolidated cases below Nos. 18939-18940 came to the Court of Appeals as appeals from the United States District Court for the Northern District of Illinois. Judgment of dismissal was entered February 12, 1971 (App. 37a). A petition for rehearing was filed on February 25, 1971 (App. 37a) and denied on March 10, 1971 (App. 39a).

2. Case No. 71-1104 below came to the Court of Appeals as an original petition for mandamus, involving identical and closely related question to those in the consolidated appeals Nos. 18939-18940, and in Mandamus No. 71-1122. Judgment of denial was entered on February 12, 1971 (App. 49a). A petition for rehearing was filed on February 25, 1971 (App. 50a), and was denied on April 8, 1971 (App. 51a).

3. Case No. 71-1122 below came to the Court of Appeals as an original petition for mandamus, involving identical and closely related questions to those in the consolidated appeals Nos. 18939-18940, and in Mandamus No. 71-1104. Judgment of denial was entered on February 26, 1971 (App. 61a). A petition for rehearing was filed on March 11, 1971 (App. 62a) and was denied on March 16, 1971 (App. 63a).

4. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED.

A. With Regard to the Denial by the District Court of Plaintiffs' Motion for Leave for their Attorneys to Communicate, Consult and Advise with the Attorneys General of the States.

1. Was it not an abuse of discretion or otherwise error for the District Court to deny plaintiffs' motion for leave to communicate, consult and advise with the Attorneys General of the States without plaintiffs first being required to obtain an order of court approving such communication?

2. Is not District Court Civil Rule 22[1] in form and effect an injunction, and is it not in conflict with applicable decisions of this Court, and is it not so far a departure from the accepted and usual course of judicial proceedings, sanctioned by the Court of Appeals, as to call for an exercise of this Court's power of supervision?

3. Did not the District Judge, in denying plaintiffs' motion for leave to communicate, consult and advise with the Attorneys General of the States without first being required to obtain a order of court approving such communication

---

[1] District Court Civil Rule 22 reads as follows:

Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of the Court.

(a) abridge the First Amendment right of free speech and press of plaintiffs and the members of their class?

(b) abridge the First Amendment right peaceably to assemble and petition the government for redress of grievances, of plaintiffs and the members of their class?

(c) deny Fifth Amendment due process of law to plaintiffs and the members of their class?

4. Does not District Court Rule 22 unconstitutionally

(a) abridge the First Amendment right of free speech and press of plaintiffs and the members of their class?

(b) abridge the First Amendment right peaceably to assemble and petition the government for redress of grievances, of plaintiffs and the members of their class?

(c) deny Fifth Amendment due process of law to plaintiffs and the members of their class?

With Regard to the Denial by the District Court of Plaintiffs' Motion That the Court Make a Class Action Determination Order under Federal Rules of Civil Procedure 23(c)(1):

5. Was it not a clear abuse of discretion for the District Court to deny plaintiffs' motion under F.R.Civ.Proc. 23(c)(1) requesting the court to determine by order (more than 2 years having elapsed since the filing of the action without the entry of such an order), whether the action should be maintained as a class action, so that the denial of mandamus by the Court of Appeals was erroneous?

CONSTITUTIONAL AND STATUTORY PROVISIONS, AND RULES OF COURT

The Constitution of the United States:

Amendment I. "Congress shall make no law * * * abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Amendment V. "No person shall * * * be deprived of life, liberty or property without due process of law."

United States Code

Tit. 15 § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal; * * *.

Tit. 15 § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *.

Tit. 15 § 15. Suits by persons injured; amount of recovery

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Tit. 15 § 18. Acquisition by one corporation of stock of another

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. * * *

Tit. 15 § 26. Injunctive relief for private parties; exception

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, * * *.

Tit. 28 § 1291. Final decisions of district courts

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. June 25, 1948, c. 646, 62 Stat. 929; Oct. 31, 1951, c. 655, § 48, 65 Stat. 726; July 7, 1958, Pub. L. 85-508, § 12(e), 72 Stat. 348.

Tit. 28 § 1292. Interlocutory decisions

(a) The courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court; * * *.

Tit. 28 § 2071. Rule-making power generally

The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court. June 25, 1948, c. 646, 62 Stat. 961; May 24, 1949, c. 139, § 102, 63 Stat. 104.

Tit. 28 § 2072. Rules of civil procedure

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

As amended Nov. 6, 1966, Pub.L. 89-773, § 1, 80 Stat. 1323.

Federal Rules of Civil Procedure

Rule 23. Class Actions

* * * * *

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise

shall be given to all members of the class in such manner as the court directs. As amended Feb. 28, 1966, eff. July 1, 1966.

Civil Rules of the United States District Court for the Northern District of Illinois

Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of the Court.

Rules of the United States District Court for the Southern District of New York

Rule 11A. Class Actions.

(c) Within sixty (60) days after the filing of a pleading asserting a claim for or against a class, the party asserting that claim shall move for a determination under Fed R Civ P 23(c)(1) as to whether the action is to be maintained as a class action and, if so, the membership of the class. In ruling upon such a motion, the court may allow the action to be so maintained, may disallow and strike the class action averments, or may order postponement of the determination pending discovery or such other preliminary procedures as appear to be appropriate and necessary in the circumstances. Whenever possible, where the determination is ordered to be postponed, a date will be fixed in the order for renewal of the motion before the same judge.

(d) If the party asserting the claim for or against a class fails to make a timely motion under subsection (c) of this rule, the opposing party shall move, within

thirty (30) days after expiration of the time allowed for such motion, to dismiss the action as a class action. In ruling upon such a motion, the court may grant or deny it in the exercise of its informed discretion; may deny it, but award costs, expenses and counsel fees against the party seeking the maintenance of the claim as a class action or his counsel; or may grant such other relief as may be appropriate in all the circumstances. [Adopted and effective 4-30-70.]

STATEMENT OF THE CASE

1. The Nature of the Action

The action now pending in the District Court at Chicago is a consumers class antitrust suit, brought under 15 U.S.C. Sections 1, 2, 15, 18, & 26, against General Motors Corporation (hereafter called GM), by 5 individual plaintiffs who as consumers purchased GM automobiles, on behalf of all such purchasers within the 4-year period of the statute of limitations. The complaint asserts that GM over many years has been unjustly enriching itself at the expense of the consumer-purchasers of its automobiles by engaging in predatory violations of the antitrust laws which have enabled GM to suppress competition and to obtain excessive prices for its automobiles. (Record in case Nos. 18939-40 pp. C9-C71, C236-C315)

The Complaint

GM as a holding company acquired the shares of five principal automobile producers: Buick, Cadillac, Chevrolet, Oakland (later called Pontiac), and Oldsmobile, in 1917 and 1918. These five businesses have continued to be operated by GM as separate entities, selling cars in competition against each other throughout the United States. (Although the original independent corporations, transformed on acquisition into GM subsidiaries, have been dissolved,

their separate businesses have been continued to be conducted in non-corporate form as substantially independently operated business entities, under the description of "Divisions." (*General Motors Corporation* v. *Washington,* 377 U.S. 436, 442, 452. (The question of whether "Divisions" of this type come within the rule as to corporate subsidiaries was noticed by this Court in 1962 in *Poller* v. *Columbia Broadcasting System,* 368 U.S. 464, 469, and is still open in this Court. *Poller,* 368 U.S. 464, 469, where the Court said, in footnote 4:

> "We do not pass upon the point urged by Poller that under the CBS corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries.")

Monopoly

Prior to 1964, GM had attained over 50% of the market in the United States in American-style automobiles, and has maintained that position up to the present [Note: except for the strike-year of 1970, when the percentage of the market dropped on account of the strike to 46.4%]. GM's profits have been and are so large that GM could have (and still can) reduce its prices to a point where GM's competitor's Ford, Chrysler and American Motors would be driven out of business, and GM would still make a profit. Ford, Chrysler and American Motors are the only remaining United States automobile manufacturers. American Motors, the smallest competitor, although doing close to a billion dollars a year in sales, has sustained operating losses of over $130,000.000 in recent years, and is in failing condition; and in the face of GM's market power, no new producer would dare to enter the business of manufacturing and distributing standard size cars in the United States. GM thus had attained and has main-

tained monopoly power in the United States standard-sized-automobile market.

For the purpose of increasing its share of the market and attaining and maintaining this monopoly power, GM has predatorily violated the anti-trust laws. [There have been at least three adjudicated contested cases: *U.S.* v. *General Motors Corp. et al.*, 121 F.2 376 (CA7 1941), conspiracy to monopolize financing of automobile sales; *FTC* v. *General Motors Corporation*, 34 F.T.C. 58 (1941), monopolization of replacement parts for automobiles; *U.S.* v. *General Motors Corporation*, 384 U.S. 127 (1966), suppression of competition in the retail sale of automobiles.]

Price Fixing

In addition to the predatory violations of which GM was adjudicated guilty in the foregoing cases, GM has utilized and utilizes two price-fixing practices to increase its share of this market. The first form is by having the prices charged for cars by the "Divisions", which compete vigorously in the market against each other, set by central management of GM.. If the "Divisions" come within the rule which applies to corporate subsidiaries, this is a *per se* violation. The second form of price-fixing is by the use of the General Motors Holding Plan. GM has for many years, as a holding company, created and maintained hundreds of retail-dealership *corporate* subsidiaries (currently about 450), in which GM owns all the voting stock, which compete in the relevant market against each other, against all other GM non-subsidiary retail dealers, and against the "Divisions" of GM themselves, which sell directly to consumers. GM fixes the prices at which its retail-dealership-subsidiary corporations buy their cars from its "Divisions," and at which they sell their cars in the competitive market described in the previous sentence.

As a result of the combination of the five original independent companies into GM, the acquisition and maintenance of monopoly power by GM's adjudicated illicit and predatory means, and the above described price-fixing practices, the prices which GM has charged for its cars have been in excess of those which it would have been able to charge if the unlawful anti-competitive situations thereby created and maintained had not existed. This excess has unjustly enriched GM, and *pro tanto* has damaged in their property the consumer-purchasers who have paid it; for which damage GM should reimburse them. The injunctive power of the court should be exercised to prevent GM from continuing its predatory practices in the future, which may require a decree of divestiture of one or more of the "Divisions," which are still in the market as continuations of the companies originally acquired in 1917 and 1918. (Rec. in case Nos. 18939-18940, pp. C236-C315; See: *United States* v. *Greater Buffalo Press Inc.*, No. 821 in this Court decided June 1, 1971.)

The present status of the action in the District Court is: GM has filed a motion to dismiss the amended complaint on the ground that it fails to state a claim on which relief might be granted. The District Court has not yet ruled on the motion.

2. Plaintiffs' Motion Relating To District Court Civil Rule 22

Civil Rule 22 was adopted by the District Court on April 15, 1970. By its terms, once a class action is filed, the plaintiffs in it and their attorneys are absolutely forbidden from all communication whatever concerning the action with other members of the class, without first submitting the communication to the court and obtaining from the court an order approving the communication.

The 50 States of the United States are the most important and strongest members of plaintiffs' consumers class. *Parker* v. *Brown*, 63 S.Ct. 307, 317 U.S. 341, 87 L.Ed. 315 They purchase large quantities of GM cars in their own right for employees, officials and departments. They are proper representatives of their multitudinous political subdivisions which make similar purchases. They may be proper representatives under the doctrine of *parens patriae* of their residents who are consumer-purchasers. (See *In re Consolidated Pretrial Proceedings in Antiobiotic Trust Actions*, 14 F. Rules Serv. 2. 1237, 1239; and *Hawaii* v. *Standard Oil Co.*, No. 1060 in this Court, Cert. granted Mar. 1, 1971.) Plaintiffs attorneys came to the decision that they wished to advise and consult with the Attorneys General of the States concerning the action. Such advice and consultation is of great mutual importance. There are serious unsettled questions as to the statute of limitations.

There are questions of strategy, tactics and policy of the utmost importance to be resolved. How best to deal with a $24 billion colossus, a veritable super-tiger in the competitive jungle? Whether to move for summary judgment, or to have a full dress plenary trial. What information do the States Attorneys General have access to which might aid the action? What advice might they want to offer concerning the action?

It is immediately apparent that such consultation concerning mutual rights and interests cannot effectively take place if all communications must first be submitted to the court for approval. The give-and-take of oral discussion, brainstorming, is ruled out. The confidentiality of the attorney-client relationship is destroyed. The court and the opponent have access to not only the work-product, but to the work-process as well.

Plaintiffs' counsel accordingly on September 25, 1970, moved for permission to enter into communication with the Attorneys General of the States, to consult and advise with them about the action, without being required to submit their communications in advance to the Court and to obtain an order of approval. The motion was addressed initially to the sound discretion of the court, and alternatively it was asserted that Civil Rule 22 was an injunction improvidently issued and in violation of the First and Fifth Amendment rights of class members. (App. 1a, 6a, 48a). The motion was denied without opinion. (App. 7a-8a). An appeal from the order of denial was dismissed without opinion. (App. 37a) A petition for mandamus in the Court of Appeals to direct the District Court to grant such permission, or to expunge Civil Rule 22 as unconstitutional and void, was denied without opinion. (App. 49a).

3. Plaintiffs' Motion for a Class Suit Determination Order Under Federal Rule of Civil Procedure 23(c)(1).

On September 25, 1970, plaintiffs' counsel made a further motion that the District Court determine by order whether the action should be maintained as a class action, as would seem to mandated by F.R.Civ.Proc. 23(c)(1), the action having been then pending for more than 2 years. (Compare Rule 11 of the Southern District of New York, which now requires the plaintiff to make the motion for class action determination within 60 days after action filed.) The motion for determination was denied without opinion. An appeal was taken (App. 7a-8a), and a concomitant mandamus was filed in the Court of Appeals (App. 40a). The appeal was dismissed (App. 37a) and the mandamus was denied (App. 61a), all without opinion.

Plaintiffs bring this petition for certiorari:

(a) to obtain a judgment of this Court that plaintiffs may communicate, consult and advise with the Attorneys General of the States concerning the action; and

(b) to obtain a judgment of this Court that plaintiffs are entitled to an order under F.R.Civ. Proc. 23 (c)(1) to determine whether the action below shall be maintained as a class action.

REASONS FOR GRANTING THE WRIT.

I.

DISTRICT COURT CIVIL RULE 22 IS A FAR DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Diligent research has failed to disclose any previous "rule", injunction or case in the entire history of Anglo-American judicial practice, imposing a general total prior restraint on communication between plaintiffs in a class suit and members of their class. Even those courts which were hostile to NAACP and subjected it and its lawyers to criminal prosecutions, contempt punishment, and exclusionary and disciplinary proceedings, never imposed prior restraint on communication.

Consequently, District Court Civil Rule 22, whether treated as innovation or as aberration, should be considered such a departure by the District Court, sanctioned by the Court of Appeals, from the accepted and usual course of judicial proceedings, as to call for an exercise of this Court's power of supervision.

II.

AT THE VERY LEAST, THE DENIAL BY THE DISTRICT COURT OF PLAINTIFFS' MOTION THAT THEY AND THEIR COUNSEL BE PERMITTED TO COMMUNICATE, CONSULT AND ADVISE WITH THE ATTORNEYS GENERAL OF THE STATES, WAS A CLEAR ABUSE OF DISCRETION, TO REDRESS WHICH THE COURT OF APPEALS SHOULD HAVE AFFORDED PLAINTIFFS A REMEDY, EITHER BY APPEAL OR BY MANDAMUS.

Supposing *arguendo* that Civil Rule 22 were valid, it was surely a clear abuse of discretion by the District Court

totally to refuse plaintiffs' motion to communicate with the Attorneys General of the States.

First, the States themselves, as retail-consumer-purchasers in their own right, were members of plaintiffs' consumer class. They were thus clients, willy-nilly, of plaintiffs' attorneys. It would be a hard thing, as the English judges used to say, if the law, or the judge's discretion could prevent the States from being advised by their attorneys-as-a-matter-of-law, of the existence of the action, or from being furnished with a copy of the complaint.

Second, common sense and right reason demand that, in a class action such as this, brought by a few individuals whose interests are not large enough to justify a non-class-action, the existence of the action should be made known to other members of the class with substantial interests, especially since questions of limitations are immediately involved, so that such other class members may have an opportunity to consider what action they wish to take to assert and maintain their claims; and especially after the action has been pending for over 2 years, and is being attacked by a motion to dismiss.

Third, since plaintiffs in private anti-trust suits are vindicating the important public interest in free competition (*Fortner Enterprises* v. *U.S. Steel Corporation*, 394 U.S. 495, 502 [1969]), they are to that extent private attorneys general (see *Flast* v. *Cohen*, 392 U.S. 83, 108, 119-120), and it would further the public interest to have them communicate, consult and advise with the other Attorneys General. How could it conceivably be in the public interest that the Attorneys General of the States might not even be informed of the existence of the action until, perchance, after it had been dismissed?

Fourth, since the interdict of Civil Rule 22 is total, if the District Court (or the Court of Appeals) had thought that the motion to communicate, consult and advise with the Attorneys General was asking too much, the Court should have indicated what limited communication it would permit, and what conditions and restrictions it wanted on the communication.

Fifth, the Court had and has ample power to impose punitive and disciplinary sanctions after the fact, if violations or improprieties in the communication be called to its attention, which is more in the public interest than total prior restraint.

It was thus an abuse of discretion for the court to *completely* cut off plaintiffs from communication with the States Attorneys General. This abuse of discretion should have been corrected either by the Court of Appeals allowing the appeal because of necessity and importance (*Gillespie* v. *United States Steel Corporation,* 379 U.S. 148 and cases cited), or by allowing mandamus for abuse of discretion.

III.

A. District Court Civil Rule 22 "Stands the First Amendment on its Head," and Should be Declared Void.

District Court Civil Rule 22 is utterly subversive of the great First Amendment guarantees of freedom of communication and freedom of petition.

The Rule is an *ex parte* total prior restraint of communication. It sets up the District Court as legislator, licenser, censor, and tribunal to try and punish supposed violations of the Rule. Communication without application for permission, which if denied must be appealed to

the highest court, seems to be contempt of court. Guilt and punishment arise, not from any fault in the content of the communication, but from the fact of communication itself. *Walker* v. *Birmingham,* 388 U.S. 307, 320. See also *Carroll* v. *President & Commissioners of Princess Anne,* 393 U.S. 175, 179.

The Rule does not purport to be based on any supposed exception to or limitation of the fundamental overriding principle against prior restraint. Even in the often-criticized case of *Kingsley Books* v. *Brown,* 354 U.S. 436, Mr. Justice Frankfurter, in sustaining an injunction against *further* distribution of a book *previously* found to be obscene, hastened to reassure: "To be sure, the limitation is the exception. It is to be closely confined so as to preclude what may fairly be deemed to be licensing or censorship." Kingsley, 354 U.S. 436, 441. "* * * [I]t studiously withholds restraint upon matters *not already published* and *not yet found to be offensive.*" 354 U.S., 445. (Emphasis supplied.)

The District Court asserts by District Court Civil Rule 22 that it has absolute authority to impose *total* prior restraint against litigants and their lawyers. All communication between them and the other members of their class is presumptively tainted. If plaintiffs wish to communicate with members of their class who are not parties, concerning their common interests, they must obtain a license from the District Court. They must first beseech the District Court as a suppliant beseeches an Oriental despot for a license. There are no standards. There is no way of knowing what burden they must assume, to move the Court to grant the license. If the Court denies the license, *or if he merely fails to act on their application,* they remain gagged. The District

Court need give no reason. The Court of Appeals will not entertain an appeal; nor will it mandamus the District Court.

A more total repudiation of constitutional principle is impossible to conceive. Truly, Civil Rule 22, on its face and as construed and applied here, stands the First Amendment on its head and should be declared void. No other District Court has adopted such a rule.[1]

B. District Court Civil Rule Denies the Plaintiffs and Their Class Fifth Amendment Due Process.

Absent Civil Rule 22, the plaintiffs and their counsel are free to pursue the common interest of plaintiffs' class, which includes and can only be effectuated by the right of communication, counselling, advice, assembly and petition, guaranteed by the First Amendment. These rights cannot be restricted under the Fifth Amendment except for a proper compelling governmental objective. Total restraint of communication is not, and cannot be shown to be reasonably related to any proper governmental objective, and such total restraint thus imposes on plaintiffs and their class, in the assertion of their claims against GM, an unconscionable and crushing burden, that constitutes an arbitrary deprivation of their liberty and property in violation of the Fifth Amendment, and is a discrimination against them as a group plaintiff that is "so unjustifiable as to be violative of due process." *Bolling* v. *Sharpe,* 347 U.S. 497, 499-500;

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[1] We are advised that the Board of Managers of the Chicago Bar Association has within the past month advised the Chief Judge of the District Court below that it supported a Bar Association Committee report saying that District Court Civil Rule 22 is unconstitutional, and that it ought to be abrogated.

See also *Schneider* v. *Rusk*, 377 U.S. 163, 168; *Shapiro* v. *Thompson*, 394 U.S. 618, 641-642.

C. District Court Civil Rule 22 Is In Conflict With Applicable Decisions Of This Court.

1. District Court Civil Rule 22 is of course in conflict with all the applicable decisions of this Court which hold that First Amendment rights are preferred rights; that any exceptions allowed against them are to be couched in the narrowest terms and the door is to be opened no more than absolutely necessary; that in the absence of a showing of clear and present danger that the supposed untoward social results of allowing freedom of communication will outweigh the benefits, the First Amendment freedoms should be sustained; and persons may not be confined to the expression of those sentiments which are officially approved.

Near v. *Minnesota*, 283 U.S. 697; *Lovell* v. *Griffin*, 303 U.S. 444, and innumerable other cases.

2. District Court Civil Rule 22 is also in conflict with that applicable line of decisions of this Court which holds that the First Amendment guarantees of free speech, petition and assembly give persons the right to cooperate in helping and advising one another to act collectively by group legal action to obtain affordable and effective legal representation, and meaningful access to the courts.

United Transportation Union v. *State Bar of* Michigan ..... U.S. ....., 91 S.Ct. 1076 (1971)
United Mine Workers v. *Illinois State Bar Assn.*, 389 U.S. 217 (1967)
Brotherhood of Railroad Trainmen v. *Virginia State Bar* 377 U.S. 1 (1964)
NAACP v. *Button*, 371 U.S. 415 (1963)

3. District Court Civil Rule 22 is also in conflict with that applicable line of decisions of this Court which holds that private antitrust suits are to be encouraged to vindicate the important public interest in free competition. The courts "should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in [the antitrust] laws". *Radovich* v. *National Football League*, 352 U.S. 445, 454; *Fortner Enterprises, Inc.* v. *U.S. Steel Corp.*, 394 U.S. 495, 502. Private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws. Persons of small means bringing private suits are to be aided, not impeded, and the policy of the law is to assist them by making available to them governmental resources, expertise and evidence. *Minnesota M&M Co.* v. *New Jersey Wood Finishing Co.*, 381 U.S. 311, 318, 319. See also *Emich* v. *General Motors Corp.*, 340 U.S. 558, 568.

4. District Court Civil Rule 22, which both in form and effect is an injunction, is in conflict with the decisions of this Court holding that

> "an injunction can issue only after the plaintiff has established that the conduct sought to be enjoined is illegal, and that the defendant, if not enjoined, will engage in such conduct." *United Transportation Union* v. *State Bar of Michigan*, 91 S.Ct. 1076, 1081 ..... U.S. ....., (1971).

There is nothing whatever in the records sought to be reviewed by this petition showing any previous illegal conduct, or that the plaintiffs and/or their lawyers, if not restrained, would engage in illegal conduct.

CONCLUSION

The special and important reasons for the granting of certiorari are:

1. This case itself is of great special intrinsic and immediate public importance, involving on the one side, more than half of the new-car purchasers of the United States, and on the other, the largest non-regulated manufacturing and mercantile enterprise in the history of the world; and involving the validity of prior restraint, by the courts, of communication, consultation and advice between class-members in class actions; and involving the administration of F. R. Civ. Proc. 23(c)(1). These problems are neither academic nor episodic, but are existing and bound to occur with great frequency in the future.

2. The Court of Appeals has decided important questions of federal statutory and constitutional law, and of the interpretation of the rules of this Court, which have not been, but should be, settled by this Court; and has decided important federal questions in ways which are in conflict with applicable decisions of this Court: and has so far departed from the accepted and usual course of judicial proceedings, and so far sanctioned such departures by the District Court, as to call for an exercise of this Court's power of supervision, in that:

(a) It has denied to the plaintiffs remedy by appeal or mandamus from, and has thus sanctioned, the District Court's order refusing plaintiffs' motion to communicate consult and advise with, other members of their class, namely the States, through their Attorneys General.

(b) It has refused to hear and decide the appeal by the plaintiffs under 28 U.S.C. § 1292(a)(1), from an order of the District Court denying the motion by plaintiffs to treat Civil Rule 22 as an injunction, and to dissolve or modify the injunction.

(c) It has sanctioned the adoption and retention of Civil Rule 22 by the District Court, which stands the First Amendment on its head.

(d) It has denied to the plaintiffs remedy by appeal or mandamus from, and has sanctioned the denial by the District Court of, plaintiffs' motion, made more than 2 years after action commenced, that the District Court make a Rule 23(c)(1) order as to whether the action below should be maintained as a class action.

3. If the positions taken by the Court of Appeals with regard to the foregoing matters be adopted with relation to other class actions, then the Class-action remedy, ancient in our jurisprudence, absolutely necessary to afford the "little man" equal justice under law, and reinforced and encouraged by F.R.Civ. Proc. 23 of this Court, will become subject, not to law, but to the despotic, unreviewable whim and caprice of the District Judges; and will be stifled and emasculated.

Respectfully submitted,

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NO. 70-244

Supreme Court, U.S.
FILED
AUG 5 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROGER BOSHES, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

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August 5, 1971

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-244

ROGER BOSHES, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

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BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

OPINIONS BELOW

No opinions were rendered by the Court of Appeals or by the District Court for the Northern District of Illinois.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether this Court should exercise its certiorari jurisdiction to review the constitutionality of a local civil rule for the prevention of abuse of class actions

a) when the District Court deferred consideration of a motion attacking the rule until a previously filed defense motion challenging the legal sufficiency of the complaint was decided,

b) when the merits of petitioners' attack on the rule were not reached either by the District Court or by the Court of Appeals, and

c) when the rule in question has since been amended by the judges of the District Court?

2. Whether this Court should exercise its certiorari jurisdiction to review the District Court's decision which simply deferred the class action determination under Rule 23 of the Federal Rules of Civil Procedure until a previously filed motion challenging the legal sufficiency of the complaint was decided?

STATEMENT OF THE CASE

On August 6, 1968, five passenger car owners, petitioners here, filed a class action on behalf of all persons in the United States who had purchased General Motors Corporation passenger cars in the preceding four years. They sought to recover treble damages on the theory that defendant General Motors, respondent here, had violated the antitrust laws by, among other things, allegedly "conspiring" with itself or with or among its internal passenger car divisions in establishing the prices for new General Motors passenger cars. The theory of the complaint appeared to have been guided by the decision in *Hawaiian Oke & Liquors, Ltd.* v. *Joseph E. Seagram & Sons, Inc.*, 272 F. Supp. 915 (D. Hawaii 1967), which was subsequently

reversed, 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970).

General Motors filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted, and the final memorandum of the parties briefing that motion was filed on August 14, 1970.

On September 28, 1970, while the motion to dismiss was under submission, petitioners filed two procedural motions. In the first, they asked that Rule 22 of the Civil Rules for the Northern District of Illinois be modified or held unconstitutional. (Pet. App. at 1a).* Rule 22 provided that in class actions brought under Rule 23 of the Federal Rules of Civil Procedure no communication concerning the action shall be made by any of the parties or by their counsel with any potential or actual class member who is not a formal party to the action, until such time as an order may be entered approving the communication. (Pet. at 3, n. 1). Petitioners stated in their motion that they wanted to be free to communicate with various State attorneys general concerning the action without court supervision. (Pet. App. at 2a).

In their second motion, petitioners asked the District Court to consider, ahead of all other matters, the class action issues under Rule 23 of the Federal Rules of Civil Procedure. (Pet. App. at 7a).

On October 6, 1970, the District Court denied petitioners' motions with leave to reinstate, explaining that it had not yet ruled on the pending motion to dismiss the complaint:

> "I think I would rather finish what I am doing now. Your motion is denied. [sic] I will rule on what is pending before me now, which was fully submitted.

---

*"Pet. App." refers to petitioners' separately printed appendix; "Res. App." refers to the appendix to respondent's opposition.

> Following that, you have leave to reinstate your motion[s], if it appears appropriate." (Tr. at 3-4, Oct. 6, 1970; Res. App. at 14).

Petitioners filed two appeals from this ruling on November 4, 1970. (Pet. App. at 8a, 10a).

On December 11, 1970, the District Court granted respondent's motion to dismiss the complaint insofar as it purported to state a claim based on Section 1 of the Sherman Act and on the so-called intra-corporate conspiracy theory. (Pet. App. at 16a). In granting the motion to dismiss, the District Court also announced:

> "The motions seeking a determination that this is a proper class action brought pursuant to Rule 23 and other questions under Rule 23 and Local Rule 22 will be considered if and when the court concludes that plaintiffs' complaint states a claim upon which relief can be granted." (Order, Dec. 11, 1970; Pet. App. at 17a).

Although the District Court had dismissed the complaint insofar as it was based on the intra-corporate conspiracy theory, other substantive allegations remained because on August 27, 1970, while the original motion to dismiss was under submission, petitioners filed an amendment to their complaint setting forth new matters.*

On January 4, 1971, General Motors moved the Court of Appeals to dismiss petitioners' appeals from the October 6th order. (Pet. App. at 11a). It argued that the order was interlocutory and therefore not appealable because the District Court had not passed on the merits of petitioners'

---

*General Motors subsequently filed a motion to dismiss the amended complaint; that motion was denied on July 8, 1971, and on July 28, 1971, General Motors filed its answer denying the substantive allegations of the amended complaint.

motions, but had simply deferred consideration of them until the sufficiency of the complaint, then under consideration, had been determined. (*Ibid.*) On February 5, 1971, while the motion to dismiss the appeals was under submission, petitioners filed a petition for writs of mandamus and prohibition, seeking to bar enforcement of Local Civil Rule 22. (Pet. App. at 40a). On February 11, 1971, petitioners filed another petition for writs of mandamus and prohibition, which sought to require the District Court to make the Rule 23 class action determination. (Pet. App. at 52a). The Court of Appeals dismissed the appeals and denied the petition respecting Local Civil Rule 22 on February 12, 1971, and it denied the petition respecting Federal Civil Rule 23 on February 26, 1971. (Pet. App. at 37a, 49a, and 61a, respectively).*

On June 15, 1971, the judges of the Northern District of Illinois amended Local Civil Rule 22 by adopting the rule for the prevention of abuse of class actions that was recommended by the Judicial Panel on Multidistrict Litigation subsequent to the adoption of original Rule 22. (Res. App. at 22).

ARGUMENT

I.

THERE IS NO REAL ISSUE FOR THIS COURT TO REVIEW.

The District Court clearly did not reach the merits of petitioners' motion respecting Local Civil Rule 22 or their motion respecting Federal Civil Rule 23. The Court simply deferred considering these motions until a previously filed

*Rehearing was denied on March 10, 1971, as to the appeals, on March 16, 1971, as to the Federal Civil Rule 23 petition, and on April 8, 1971, as to the Local Civil Rule 22 petition. (Pet. App. at 39a, 63a, & 51a, respectively).

motion (which had been briefed and was under consideration) challenging the legal sufficiency of the complaint was disposed of, and it expressly granted petitioners leave to resubmit their motions at an appropriate time. (Pet. App. at 17a; Res. App. at 14). This ruling did not involve any determination of substantive matters. It was an exercise of sound discretion in the interest of judicial economy, since dismissal of the complaint would have obviated the necessity for any class action determination and the need for any class communications.

Rulings of this kind are manifestly not final decisions suitable for review by way of certiorari. In *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916), this Court explained its denial of a petition for a writ of certiorari as follows:

> "The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application...."

See also *Goldstein* v. *Cox*, 396 U.S. 471, 478 (1970). In *Appalachian Power Co.* v. *American Institute of Certified Public Accountants*, 80 S. Ct. 16, 4 L. Ed.2d 30 (1959), Mr. Justice Brennan denied a stay of the mandate of the Court of Appeals pending disposition of a petition for certiorari on the ground that none of the questions presented had the prospect of commanding four votes for review, stating:

> "ordinarily an application by a District Court of the Rules of Civil Procedure where affirmed by the Court of Appeals will not be reviewed by this Court. This is particularly true where, as here, the question is one that concerns the judgment of the District Judge in relation to a particular set of facts."

Certiorari was subsequently denied. 361 U.S. 887 (1959).

The issues that petitioners seek to have reviewed here were not even ripe for decision by the Court of Appeals. That Court presumably dismissed petitioners' appeals because the order appealed from was not a final order and hence not appealable, the only ground for dismissal urged by respondent. (Pet. App. at 11a). Dismissal by the Court of Appeals was clearly mandated by the teaching of such decisions as *Switzerland Cheese Association, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966), which hold that pretrial orders "that in no way touch on the merits of [a] claim but only relate to pretrial procedures" are not appealable.

II.

THE AMENDMENT OF LOCAL CIVIL RULE 22 MAY HAVE MOOTED THE CONSTITUTIONAL ISSUE THAT PETITIONERS WOULD RAISE.

On June 15, 1971, the judges of the Northern District of Illinois amended Local Civil Rule 22 to conform to a comparable rule recommended by the Judicial Panel on Multidistrict Litigation. *Manual for Complex and Multidistrict Litigation* § 1.61. The amended rule differs from former Local Rule 22 in several respects and includes the following provision which was not present in the former rule:

> "This rule does not forbid . . . communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein." (Res. App. at 23).

Since petitioners' motion was made before Rule 22 was amended, their motion should, in any event, be resubmitted by them and considered by the District Court in the light of the new rule. See *Bryan* v. *Austin*, 354 U.S. 933 (1957).

Conversely, it would be inappropriate for this Court, without having the benefit of a decision on the merits by either lower court, to consider the constitutionality of a rule that has been revised. This Court "does not sit to satisfy a scholarly interest" in issues which may have become academic, particularly when they involve matters of constitutionality. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955).

III.

REVIEW OF LOCAL CIVIL RULE 22 BY THIS COURT IS INAPPROPRIATE FOR OTHER REASONS.

After Rule 23 of the Federal Rules of Civil Procedure was revised in 1966 to expand the availability of the class action device, a problem emerged that was not covered by the Rule itself. That problem was the abuse of class actions by improper solicitation of class members and by misrepresentation of the litigation in communications to them.* Following careful study, the Judicial Panel on Multidistrict Litigation reported in May, 1970, that:

> "The class action under Rule 23 is subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not

*For example, in *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 281 F.Supp. 622, 625 (S.D. N.Y. 1968), it was discovered that, although the court had approved a notice to be sent to the class members, plaintiffs' counsel had enclosed with the notice an unauthorized letter of their own, which was held to be improper because of "inferences which might easily be drawn from it which do not reflect accurately the legal position of the members of the class."

formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses timely action should be taken by local rule or by orders in the particular civil action or by both." *Manual for Complex and Multidistrict Litigation* §*1.61.*

Even before the Judicial Panel's recommendations were published, District Courts had made tentative efforts to deal with the problems described. Mindful of the power, and the duty, of the trial court to regulate certain communications in order to protect the integrity of the judicial process, *Sheppard* v. *Maxwell,* 384 U.S. 333 (1966); *Estes* v. *Texas,* 381 U.S. 532 (1965); *Cox* v. *Louisiana,* 379 U.S. 559 (1965), several District Courts had entered orders in particular cases prohibiting communications with actual or potential class members without approval of the court. See, *e.g., Siegel* v. *Chicken Delight, Inc.,* 271 F.Supp. 722 (N.D. Cal. 1967); *City of San Diego* v. *Rockwell Mfg. Co.,* No. C-50190-GHB and related cases (N.D. Cal. 1970). (Res. App. at 18). A local rule to that effect was adopted by the Northern District of Texas. (Misc. Order No. 688, Feb. 27, 1970). (Res. App. at 20). Petitioners' diligent research notwithstanding (Pet. at 17), Civil Rule 22 of the Northern District of Illinois was adopted in the light of these previous efforts. See also *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.,* 1970 Trade

Cas. ¶73,346 (E.D. Pa. 1970), at 89,387; Frankel, *Some Preliminary Observations Concerning Civil Rule 23*, 43 F.R.D. 39, 44 (1967).

IV.

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW IN RESPECT TO RULE 23.

Petitioners would have this Court review an order which postponed the Rule 23 class determination until the legal sufficiency of the complaint (particularly the intra-corporate conspiracy issue) was determined without offering a solitary reason why such a routine procedural ruling should be reviewed by certiorari. Plainly, "the [District] Court under Rule 23 is given wide discretion to make class determinations at such times and under such circumstances as will best fit the needs of a particular case." *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp.*, 1970 Trade Cas. ¶73,346 (E.D. Pa. 1970), at 89,390. As the Court of Appeals for the Second Circuit has observed, issues of judicial administration involving Rule 23 "should not be decided in an abstract or academic manner but rather in a practical and realistic way by a trial judge who has knowledge of the actual problems presented. . . ." *City of New York* v. *International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2d Cir. 1969).

Orders similar to the one at issue are not infrequently entered in class actions pending the determination of other issues. *Philadelphia Housing Authority* v. *American Radiator & Standard Sanitary Corp., supra; Berland* v. *Mack*, 48 F.R.D. 121, 124 (S.D. N.Y. 1969). And they are clearly proper where the prior determination of other issues may simplify or even dispose of the litigation before resort to the complex mechanics of Rule 23 is required. See *Manual*

for Complex and Multidistrict Litigation §1.8. There is no basis for review by this Court of such a procedural ruling, based as it is on the particular facts of this particular case, having no implications beyond this case. *Layne & Bowler Corp.* v. *Western Well Works, Inc.*, 261 U.S. 387, 393 (1923); *Rice* v. *Sioux City Memorial Cemetery, Inc.*, 349 U.S. 70, 79 (1955). Moreover, since the District Court has now denied respondent's motion to dismiss the amended complaint and respondent's answer has been filed, Rule 23 matters would seemingly be the next order of business for the District Court.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 5, 1971

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Boshes v. General Motors Corporation, Transcript of Proceedings in District Court, October 6, 1970.

THE CLERK: 68 C 1454, Boshes versus General Motors. Motion for orders under Rule 23 and Rule 22.

Same case, same title, motion of plaintiff to file amendment number one to the complaint and for an order on defendant to file a responsive pleading.

THE COURT: All right, who wants to say something?

MR. CHAFFETZ: Would you rather go first?

MR. SUEKOFF: If the Court please, we have our motion for leave to file our amendment to the complaint. We also have our motion this morning for alternative orders with respect to Rule 22.

THE COURT: Well, I think I have enough before me now to rule on the matter that is now pending, but do you agree to the filing of the amended complaint?

MR. CHAFFETZ: Yes, your Honor. Our suggestion is that your Honor proceed to rule on the matters now before you, that you accept the amendment and treat that as a separate matter and give us 45 days in which to—

THE COURT: I am half-way through the memorandum of what is now before me. Now do I have to stop and start all over again, is that what you want?

MR. CHAFFETZ: We think not. May I spell that out? This amendment, while it purports to be a physical amendment of the original complaint, added paragraph 24-A which is an entirely independent and separate matter from the subject matter of the complaint.

THE COURT: But you have no objection to their filing it?

MR. CHAFFETZ: No objection to their filing it, and all we ask is that we have 45 days to investigate and possibly at the end of that time file a separate motion to dismiss.

THE COURT: We will give leave, then, to file amendment number one as you designate it here, to the complaint and 45 days to answer or otherwise plead.

Now, then, as to these successive alternative orders to treat Civil Rule 22—what are you talking about? What is it you want? I think the matter is fully briefed and I'm half-way through it. Now, what do you want to do, start all over again?

MR. SUEKOFF: No, your Honor. While this is pending and before there is any decision one way or the other, we would like to be able to contact the representatives of our class, the State Attorneys General—

THE COURT: I think I would rather finish what I am doing now. Your motion is denied. I will rule on what is pending before me now, which was fully submitted. Following that, you have leave to reinstate your motion, if it appears appropriate.

(Which were all the proceedings had in the above-entitled cause.)

City of San Diego v. Rockwell Mfg. Co., No. C-50190-GHB and related cases (N.D. Cal.), Pre-trial Order No. 1

IN THE

UNITED STATES DISTRICT COURT

FOR THE

NORTHERN DISTRICT OF CALIFORNIA

CITY OF SAN DIEGO, *Plaintiff,* v. ROCKWELL MANUFACTURING COMPANY, et al., *Defendants.*	No. C-50190-GHB and related cases Nos. C-50191-GHB, C-50192-GHB, C-50249-GHB, C-50284-GHB, C-50339-GHB, C-50613-GHB, C-50947-GHB, C-50949-GHB, C-51131-GHB, C-51526-GHB, C-51741-GHB, C-52338-GHB, C-69170-GHB, C-69172-GHB, C-69173-GHB, C-69191-GHB, C-69227-GHB, C-69453-GHB and C-69570-GHB

PRE-TRIAL ORDER NO. 1

A preliminary pre-trial conference having been held in the above actions on January 7, 1970, at which all parties were represented by counsel,

IT IS ORDERED severally in each of the above actions that:

1. This order bears the titles or court file numbers of the above actions solely as a matter of convenience of court and counsel and does not constitute in any way a consolidation of any of those actions with any other of those actions for any purpose. A list of such actions is attached hereto as Appendix A.

2. A duplicate of this order shall be filed in each of the above actions, shall have the same effect as an original

hereof and shall apply only to the actions in which it is filed.

3. Reference herein to "plaintiffs" is solely to the plaintiffs named in each particular action in which a duplicate of this order shall be filed, and reference herein to "defendants" is solely to the defendants named in the complaint in each of such actions.

4. It is ordered that the general obligations of the parties with respect to the conduct of the proceedings as set out at pages 4 through 10 of the transcript dated January 7, 1970, are hereby incorporated by reference herein.

5. Maxwell M. Blecher and William H. Orrick, Jr., are hereby appointed liaison counsel for plaintiffs and defendants, respectively.

6. All discovery or other pretrial proceedings in the above actions are stayed, except as hereinafter provided, subject to further order of Court.

7. A further pre-trial conference in the above actions shall be held at 9:30 A.M. on February 26, 1970, at the United States Court House, 450 Golden Gate Avenue, San Francisco, California.

8. The first wave interrogatories propounded by defendants in action No. 50190 and certain other actions shall be deemed to have been served upon plaintiffs in all of the above actions. Plaintiffs which have not heretofore filed objections to those interrogatories shall have until January 30, 1970, within which to file such objections as they may have. A hearing on all objections to said interrogatories shall be held on February 26, 1970. Plaintiffs shall file their interrogatory answers on or before April 3, 1970.

9. On or before January 30, 1970, or such other date as may be agreed upon among the parties, all plaintiffs

in actions Nos. 50190, 50191, 50192, 50249, 50284, 50339, 50613, 50947, 50949 and 51131 shall complete their production of the following documents:

> All records, memoranda, correspondence and other documents and papers relating to the purchase of water meters or parts therefor by plaintiff for the period commencing January 1, 1960, to date, including without limitation all specifications, invitations for bids or quotes, bids, quotes, awards and papers relating to the same.

10. On or before April 3, 1970, or such other date as may be agreed upon between the parties, plaintiffs in all of the above actions other than the actions enumerated in paragraph 9 hereof shall produce their documents of the sort described in said paragraph 9; provided, however, that said plaintiffs may have until January 30, 1970, to file any objections they may have to the production of such documents, and a hearing shall be held on any such objections on February 26, 1970.

11. Defendants' application to the Court for leave to take depositions of representatives of plaintiffs shall be heard on February 26, 1970.

12. The Motion to Produce heretofore filed by plaintiffs in action No. 50190, and others, shall be deemed to have been served upon all defendants in all of the above actions, provided, however, that plaintiffs may have until January 23, 1970, in which to file such additions, amendments or corrections to said motion (and supporting documents) as may be desired, and that defendants shall have to and including February 20, 1970, in which to file any memorandum in response to any such proposed additions, amendments or corrections. A hearing on said motion shall be held on February 26, 1970.

13. By January 23, 1970, plaintiffs shall file first wave interrogatories. Defendants shall have to February 20, 1970, in which to file objections to said interrogatories. A hearing shall be held on such objections on February 26, 1970. Defendants shall file their interrogatory answers on or before April 3, 1970.

14. The motions for summary judgment filed by defendant Rockwell in actions Nos. 50190, 50191, 50192, 50284 and 50949 shall be heard on February 26, 1970.

15. The procedure for resolving the issue of whether actions Nos. 50284, 69170 and 69191 may be maintained as class actions in the form in which filed shall be considered by the Court on February 26, 1970. On or before January 30, 1970, plaintiffs in said actions shall file memoranda addressed to this subject, and defendants shall file any memoranda responsive thereto on or before February 23, 1970.

16. Counsel for plaintiffs in cases transferred from other districts for consolidated pre-trial proceedings, pursuant to 28 USCA § 1407, are admitted to practice in this Court for the purpose of those proceedings. Papers filed by counsel in such transferred cases need not comply with Local Rule 10 requiring papers filed to have numbered lines.

17. In all cases in the Water Meter litigation wherein class action is sought or approved, all parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and pro-

posed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or the administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

Dated: January 30, 1970.

/s/ GEORGE H. BOLDT
United States District Judge

Local Rule for Prevention of Potential Abuse of Class Action, Misc. No. 688 (N.D. Tex.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

LOCAL RULE

FOR PREVENTION OF POTENTIAL ABUSE OF CLASS ACTION

In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing, with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b) (3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any

party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule. For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

/s/ JOE E. ESTES
Chief Judge, United States District Court

/s/ SARAH T. HUGHES
United States District Judge

/s/ LEO BREWSTER
United States District Judge

/s/ W. M. TAYLOR, JR.
United States District Judge

/s/ HALBERT O. WOODWARD
United States District Judge

Rules of the District Court for the Northern District of Illinois, Civil Rule 22 (as amended June 15, 1971)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

In accordance with the unanimous action of all of the Judges of this Court in executive session on June 15, 1971, this Court finds that class actions under Rule 23, Federal Rules of Civil Procedure, are subject to abuse, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses, this Court unanimously adopts the following order.

ORDER

IT IS HEREBY ORDERED that Rule 22 of the Civil Rules of this Court be, and the same is hereby amended to read as follows:

RULE 22. For Prevention of Potential Abuse of Class Actions.

In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney

General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

ENTER:

FOR THE COURT

EDWIN K. ROBSON
Chief Judge

June 15, 1971

MOTION FILED

AUG 5 1971

IN THE

Supreme Court of the United States

No. 70-244

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,

Petitioners,

v.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF CONSUMERS UNION OF U.S. INC., FEDERATION OF HOMEMAKERS, NATIONAL LEGAL AID AND DEFENDER ASSOCIATION, AMERICAN CIVIL LIBERTIES UNION AND RALPH NADER AS AMICI CURIAE

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It is hereby respectfully moved pursuant to Rule 42 of the Rules of this Court that the above named amici curiae be granted leave to file the accompanying brief in support of the petition for a writ of certiorari.

Consent to such filing has been requested and has been granted on behalf of petitioners, but denied on behalf of respondent, General Motors. Our letter to Judge Campbell, as a nominal respondent, has not been answered.

The interest of amici curiae as stated in the accompanying memorandum is as follows:

Consumers Union of U.S. Inc. is a nonprofit membership organization with nearly 2,000,000 members whose purpose is to provide information and counsel to consumers about the management of family expenditures, including information relating to legislative, judicial and regulatory actions of government affecting consumer welfare. Consumers Union accepts no support from any commercial organization. Federation of Homemakers is a nationwide membership organization of consumers, with some 6,000 active members, particularly interested in food and drug matters, which participates in administrative, judicial and legislative proceedings on behalf of consumers. The American Civil Liberties Union is a non-partisan and nonprofit corporation whose purpose is defending and advancing civil liberties through litigation and public education. The National Legal Aid and Defender Association is a membership organization to which nearly all the public defender, legal aid and legal services projects throughout this country belong. NLADA is devoted to providing effective legal assistance, civil and criminal, to poor persons. Ralph Nader in his individual capacity, and through associated nonprofit organizations which he has founded, has for many years been devoted to the goal of making private corporations and the instruments of government more responsive to the needs of consumers and the public generally.

Amici curiae have in common the public interest objective of developing methods to protect individuals, as consumers and otherwise, against abuses incident to the exercise of concentrated economic power. To that end the class action, particularly as expanded and improved by the 1966 amendments to the Rules of Civil Procedure is poten-

tially a most helpful device. However, a recent, but developing, trend among the federal district courts involves exercise of pervasive and unwarranted censorship over communications between initial class action plaintiffs and other members of the class. Amici curiae consider this trend to be a serious threat to the efficacy of the class action device, and consequently to the important public interests they are endeavoring to advance. They have not sought to intervene in the instant class action or otherwise to participate with respect to its merits, but submit this Memorandum to urge this Court to grant the writ of certiorari, in order to supervise and limit this censorship development as exhibited in this case.

Amici Curiae, in their aggregate, have a far wider stake in the problem presented than have petitioners. In view of that broader interest, and because our presentation differs somewhat from that of petitioners, we believe that a separate expression of views is warranted. In addition, the accompanying memorandum discusses developments since the petition and accordingly not discussed therein, including an amendment to the district court rule challenged by the petitioners. The possible significance of this amendment is indicated by respondent's letter to the clerk dated June 28, 1971, which requested an extension of time "to

determine whether the amendment bears on the disposition of the petition."

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Consumers Union of U.S. Inc. is a nonprofit membership organization with nearly 2,000,000 members whose purpose is to provide information and counsel to consumers about the management of family expenditures including information relating to legislative, judicial and regulatory actions of

government affecting consumer welfare. Consumers Union accepts no support from any commercial organization. Federation of Homemakers is a nationwide membership organization of consumers, with some 6,000 active members, particularly interested in food and drug matters, which participates in administrative, judicial and legislative proceedings on behalf of consumers. The American Civil Liberties Union is a non partisan and nonprofit corporation whose purpose is defending and advancing civil liberties through litigation and public education. The National Legal Aid and Defender Association is a membership organization to which nearly all the public defender, legal aid and legal services projects throughout this country belong. NLADA is devoted to providing effective legal assistance, civil and criminal, to poor persons. Ralph Nader in his individual capacity, and through associated nonprofit organizations which he has founded, has for many years been devoted to the goal of making private corporations and the instruments of government more responsive to the needs of consumers and the public generally.

STATEMENT

On August 6, 1968, a class action against respondent General Motors Corporation (General Motors) was brought by five purchasers of General Motors passenger automobiles for relief for alleged violations of Section 1 and 2 of the Sherman Act and Section 7 of the Clayton Act.

There were a number of orders, pursuant to stipulation, extending time to file a responsive pleading. On March 23, 1970 General Motors filed a motion to dismiss the complaint (Rec. 126-127). On September 28, 1970, after the issues on General Motors' motion were under advisement, petitioners moved the District Court for relief from restrictions against communication with members of the class, purportedly imposed by its Rule 22.[1] This motion

[1] Rule 22 as then in effect provided:

> Rule 22. For Prevention of Potential Abuse of Class Action. In every action brought as a class action under Rule

was in the alternative: First, to treat District Court Rule 22 as applied to this case as in effect an injunction, and to modify and dissolve such injunction, so as to establish the right of plaintiffs and/or their counsel to communicate with the several states of the United States, through their Attorneys General, as potential members of the class, without prior censorship and without subsequent disclosure to the court and/or counsel, except for good cause shown; Second and Third, to declare Rule 22 void and expunge the Rule as in violation of the First Amendment and beyond the rule-making power of the District Court. A second and simultaneous motion was for a determination pursuant to Rule 23 of the Rules of Civil Procedure that the action is maintainable as a class action and to provide for appropriate notice to the class.

Both motions were denied by order dated October 6, 1970 (App. 7a-8a). Petitioners' attempts to challenge the District Court's rulings by appeal (App. 8a) and alternatively by mandamus and prohibition (App. 12a, 40a, 52a) resulted respectively in dismissal of the appeal on motion of General Motors (37a); rejection of the alternative petitions (App. 49a, 61a); and denial of petitions for rehearing (App. 39a, 51a and 63a).[2] The petition for a writ of certiorari was filed on June 7, 1971. Meanwhile, proceedings have continued in the District Court. General Motors' motion to dismiss the complaint was granted in part and

23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.

Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of the Court.

[2]General Motors' motion to dismiss the appeal relied primarily on the possibility that the District Court at a later stage might reconsider its denial of petitioners' motions, as suggested by statements of that court both at the time of and subsequent to, the orders under appeal (App. 16, 12a, 13a).

denied in part (App. 16a). Since the filing of the petition for certiorari, the District Court has denied a General Motors' motion to dismiss the amended complaint.

Local Rule 22 has been amended since the filing of the petition.[3] The genesis and scope of that change is as follows:

(a) Rule 22 in its original form had been adopted April 15, 1970, and was apparently suggested by preliminary drafts of the recommendations later incorporated into the Manual for Complex and Multi-District Litigation (hereinafter referred to as the Manual).[4]

(b) On May 14, 1971 the President of the Chicago Bar Association transmitted to the Chief Judge of the District Court a committee report expressing the opinion that in its then form Rule 22 was unconstitutional "as an overly broad restraint on the First Amendment right to freedom of speech." The report also concludes that Rule 22 "cannot be corrected by employment of omitted language contained in Suggested Local Rule 7 [contained in the Manual], or by modification of existing Rule 22. The same problems of overbreadth and prior restraint would continue to exist."

(c) For reasons set forth in a letter of its Chief Judge dated June 24, 1971, the Judges of the District Court rejected the Committee's suggestions, but amended its Rule 22 to conform to the recommendations in the Manual.[5]

The amended rule specifies certain communications which are forbidden, but does not lift the blanket restraints upon

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[3]The full text of the amended Rule 22 is appended hereto.

[4]The Manual which is conveniently available as a supplement to Moore's Federal Practice represents procedures "recommended" by a Board of Editors most of whom are Federal judges, designated by the "Panel" appointed by the Chief Justice pursuant to section 1407 of Title 28 of the United States Code.

[5]We are advised that unless previously set forth in General Motors' response to the petition, petitioners will submit the full text of those letters in a reply memorandum.

all other communications including those challenged by the petition for certiorari.[6]

QUESTION CONSIDERED IN THIS MEMORANDUM

The Amici Curiae consider the basic issue to be:

Whether it is consistent with the First Amendment or the Federal Rules of Civil Procedure related to class actions to impose, without specific showing of need, a pervasive bar to any communication and consultation between the original class action plaintiffs and all other persons having a potential interest in the litigation, except communications subject to advance disclosure to their adversary and advance court censorship with attendant delays and impediments to prompt and free discussion.[7]

[6]The amendment excludes from the prohibition "communications occurring in the regular course of business or in the performance of the duties of a public officer or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein." This appears to us to permit a public agency a qualified freedom of communication, but not to permit any communications to the office or agency at the initiation of a private class action plaintiff.

By letter dated June 28, 1971, General Motors requested an extension of time to respond to the petition for certiorari in order to determine "whether the amendment of the rule bears on the disposition of the petition:" We are not yet aware of its position as to the effect of the amendment. Unless the parties to the litigation should stipulate that under the amended rule the petitioners are no longer restrained from communicating, consulting or advising with the state Attorneys General to the full extent requested in their motion to the District Court and the District Court should approve such a stipulation, the amendment of the Rule cannot operate to moot this case.

[7]Whether the District Court should have determined the propriety of proceeding by way of class action and provided for notice to the class as contemplated by Rule 23 of the Rules of Civil Procedure is subsidiary to the basic issue. Delay in resolution of this subsidiary matter aggravates the burden of restraints upon petitioner's communication with potential allies. We also regard the procedural questions

DISCUSSION

1. It is now settled that the First Amendment bars sweeping restraints upon communication incident to the exercise of legal rights, even though the restraints may have some relationship to the supposed evil of solicitation of legal business. See *United Transportation Union v. State Bar of Michigan*, ___ U.S. ___, 91 S.Ct. 1076 at 1082. After discussing *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1; *United Mineworkers v. Illinois State Bar Association*, 389 U.S. 217, and *NAACP v. Button*, 371 U.S. 415, the opinion states:

> "The common thread running through these decisions is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." 91 S.Ct. 1076 at 1082.

Like *United Transportation Union* and the cases cited therein, the instant case involves interference, without any specific showing of need therefore, with meaningful access to the courts. Thus Rule 22 of the District Court as applied in this case bars the taking of realistic, effective and timely action whereby scattered plaintiffs with individually small, but in the aggregate large, economic interests may combine or even communicate among themselves as participants in class suits against large and powerful adversaries. Thus, they may not consult or seek to gather evidence from others having a similar interest. They may not bolster their status as adequate representatives of the class by inducing others to join them, or otherwise to evidence acquiescence in such representation.[8] They may not seek financial

as to the appealability of the District Court's orders and alternatively as to the appropriateness of mandamus, as subsidiary to the basic substantive question. Cf. *Organization for a Better Austin, et al. v. Keefe*, ___ U.S. ___, 91 S.Ct. 1575, 1577 n. 1.

[8]See *Weeks v. Bareco Oil Co.*, 125 F.2d 84, 94 (C.A. 7, 1941) where it was held that plaintiffs were properly held not sufficiently representative, noting that "they could, and should, have supplied some proof that others in the class desired the suit to go on." Other cases, particularly since the 1966 amendment to Rule 23, have

support from others of the class, even state governmental authorities as potential civil litigants. They may not by cooperation and division of effort with attorneys representing others of the class seek to reduce their own legal expenses.[9]

In addition to its impact upon the initial plaintiffs, the rule impinges unreasonably on the rights of other members of the class, in this instance the several states through their Attorneys General, to receive timely information of the pendency of the action, so that they may take such steps as may be appropriate to protect their interest, including cooperation with the initial class action plaintiffs. The First Amendment protects the right to receive as well as the right to transmit information. See *Lamont v. Postmaster General*, 381 U.S. 301.

2. While we believe that the decisions below involve such violation of petitioners' constitutional rights as would warrant setting aside a legislative proscription of similar scope, reversal of the decisions below requires only a conclusion that the challenged action of the courts below must be set aside so that Rule 23 of the Rules of Civil Procedure may be administered in a manner consistent with First

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allowed class actions to go on with relatively few named plaintiffs, but the initial plaintiffs can not feel sure that they will not be challenged as inadequate representatives. See *Hohman v. Packard Instrument Co.*, 399 F.2d 711 (C.A. 7, 1968), Moore's Federal Practice ¶ 23.07[4].

[9]While not specifically challenged on that ground by the petition, the rule unrealistically imposes restraints which individual consumer plaintiffs might inadvertently violate in their everyday life, by merely talking about the case with friends who might happen to be consumers of a similar product. As applied to a class action for damages for alleged racial discrimination in employment, such a restraint could be violated by the most natural discussions of the case among fellow employees. Cf. a sweeping restraint imposed in such a case by order dated June 18, 1971 in *Joseph P. Moody, et al., Plaintiffs v. Albermarle Paper Company, et al.*, Civil Action No. 989 (Eastern District of North Carolina, Wilson Division).

Amendment rights. It is not necessary to reach the problem, which has troubled some members of this Court, as to the extent of the deference to be accorded to state regulation of the practice of law. See the dissenting opinions in *NAACP v. Button* and *United Transportation Union, supra,* p. 6. No comparable deference for the views of lower federal courts is required in the exercise of this Court's supervisory jurisdiction. The views expressed in the Manual, however distinguished their sponsors, do not purport to be more than "recommendations," and of course may not amend the Rules of Civil Procedure. Moreover, this Court has not hesitated to re-examine and reject in application, even provisions of the Rules of Civil Procedure if found to be unlawful. See *Mississippi Publishing Corp. v. Murphree,* 326 U.S. 438, 443.

3. The courts below did not issue any opinions and the record gives virtually no indication of rationale for the restraint on communication.[10] It is necessary to look for explanation to the Manual (Sections 1.11, 1.61, 1.62) and to Chief Judge Robson's letter of June 24, 1971, which relies on the Manual. That letter concludes (p. 7) that the restraints of Amended Rule 22 are "reasonable regulations . . . to protect the integrity of the judicial process

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[10]General Motors' motion to dismiss the appeal contains, as its only argument on the merits, the following footnote reference (App. 13):

> "The district court no doubt recognized the inefficiency inherent in determining the class action issues or permitting communication with alleged class members regarding an action the court might shortly dismiss for failure to state a claim."

In the context of adversary litigation, it is not unrealistic to assume General Motors was seeking to impede rather than advance the efficiency of plaintiff's efforts. Cf. the warning in *Weeks v. Bareco Oil Co., supra,* 125 F.2d 84, 94, "The chances of tiring the litigant or putting him to such large expense that the right of action would be a remedyless one, may be part of the tactics of a combination of such large companies as are here sued."

from the two potential abuses inherent in class suits: solicitation and misrepresentation."

We may assume with the judges of the District Court that the First Amendment does not bar even prior restraints upon freedom of speech or of the press, where there is an imminent threat to the administration of justice as from newspaper activities calculated to interfere with a fair trial or from picketing in the close vicinity of the court house as in *Sheppard v. Maxwell*, 384 U.S. 333, *Estes v. Texas*, 381 U.S. 532 and *Cox v. Louisiana*, 379 U.S. 559. These cases, cited in the Chief Judge's letter of June 24, 1971, do not appear to support prior censorship of private communications between class action plaintiffs and other members of their class.

We assume, further, that some members of the class may need protection against being misled as to their rights, or from being enticed into improvident fee contracts, as a result of unsupervised general communications.[11] Surely, however, governmental agencies and persons represented by counsel—*a fortiori*, state agencies represented by their Attorneys General—do not need to be shielded by prior judicial censorship from the possibility of being misled or overreached in private discussions with the initial class action plaintiffs or their attorneys.[12]

Nor can it be a proper concern of the class action court to impose prior restraints to guard against the possibility that such private discussions might, as stated in amended Rule 22, "create impressions tending, without cause, to reflect adversely on any party, any counsel, the court, or

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[11] The Chief Judge's letter states at page 4: "Unchecked communications with hundreds or thousands of potential clients or adversaries may, however, lead to potential abuse . . . ."

[12] A requirement that any resulting arrangements for legal fees be subject to subsequent disclosure to and approval by the court scarcely seems necessary for the protection of parties represented by counsel, but is the most that could conceivably be justified for the protection of such parties.

the administration of justice." In this context, even after the fact restraints on public statements raise serious constitutional questions. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 273-4.

4. Another apparent purpose of both former and amended Rule 22 is to curb "solicitation." This supposed evil, however, has not been specifically defined in the context of a class action. For example, is there not a valid distinction between solicitation of an original client, and good faith efforts to serve that client's interest by enlisting necessary support of others?[13]

Undiscriminating application of a ban on solicitation as an ethical abstraction should not be permitted to be used as an instrument of oppression by dominent interests. See *United Transportation Union* and cases relied on therein, *supra*.[14] See also, Schuchman, *Ethics and Legal Ethics*, 37 *George Washington Law Review*, 244, 262-66; Comment in 5 *Harv. Civil Rights-Civil Liberties Law Review*, 334, 348-78; note in 79 *Yale Law Journal*, 1179 (1970), criticizing some formulations and applications of Canons of Legal Ethics as advancing special interests incompatible with the public interest.

"Stirring up" of litigation as a common law crime has only a remote application here.[15] It should be noted that

[13]See *People ex rel. Chicago Bar Association v. Edelson et al.*, 313 Ill. 601, 145 North Eastern 246 at p. 249 (1924), holding that an attorney with a claim for collection "which it is his duty to collect should not be barred from soliciting other claims in order to secure creditors sufficient in number and amount to authorize the filing of a petition in bankruptcy . . . ." Another example was the traditional practice, prior to Chapter X of the Bankruptcy Act, of arranging an equity receivership by finding a suitable creditor as a nominal plaintiff.

[14]These cases involved solicitation of legal employment although not by the attorneys whose employment resulted.

[15]See the discussion of historic evils in *NAACP v. Button*, 371 U.S. p. 439-443, particularly the statement at p. 439 that "malicious intent was the essence of the common law offense of fomenting or stirring up litigation."

Rule 22 becomes operative only after a class action has already been started—and applies in a context where Rule 23 of the Rules of Civil Procedure contemplates such notice to members of the class as will give them an opportunity to assert claims that might otherwise lie dormant. Moreover, even if communications with state Attorneys General should stimulate their zeal and assist in the discharge of their public responsibilities to protect the interests of their states and subdivisions as consumers, that can scarcely be regarded as an evil.[16]

5. Whatever the justification for some prior restraints upon communications in connection with class actions, the District Court Rule 22 is a clear embodiment of the abuse of "overbreadth" which has been held to vitiate legislation impairing First Amendment rights, even when a more precisely aimed prohibition could be justified. See *NAACP v. Button, supra,* 371 U.S. at p. 432. See also, *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 183-184; *Hiett v. United States,* 415 F.2d 664, 671-73 (C.A. 5, 1969), cert. denied 397 U.S. 936. See Note in 83 *Harv. L.R.* 844 (1970).

The recent amendment to Rule 22 does not cure the defect of overbreadth. As noted, *supra,* p. 4, private class action plaintiffs continue to be restrained from initiating communications with public agencies or their counsel or other persons represented by counsel, notwithstanding the exception for "communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representations by counsel, or misrepresenting the status, purposes or effect of the action or orders therein."

[16] In addition, proper respect for the division of powers as well as for working federalism should induce the courts to refrain from permitting private litigation to turn on communications designed to motivate executive as well as legislative action, even where there are charges of conspiracy and unfair tactics, not present in the instant case. See *Eastern Rail Presidents' Conference v. Noerr Motor Freight Inc.,* 365 U.S. 127.

In addition, the qualifying language introduces new problems of vagueness.[17] If the class action plaintiff undertakes to communicate in reliance on the exception, are his communications subject to discovery and challenge to resolve questions collateral to the other issues in the case, at the instance of the class action defendant? For example: whether a particular communication is in the ordinary course of business of the agency, or arguably ultra vires; whether it arguably has the effect of "soliciting representations by counsel or misrepresenting the status, purpose or effect of the action?"[18]

The overbreadth of the prohibition in Rule 22 is not relieved by the fact that the rule permits the class action plaintiffs to apply to the court for specific permission for some limited communications. A general ban pending a showing that a particular communication is appropriate is the essence of constitutionally impermissible censorship. See *Near v. Minnesota,* 283 U.S. 697; *Kingsley Books v. Brown,* 354 U.S. 436, 445. It involves shifting the burden of persuasion to those seeking to exercise First Amendment rights, as well as danger of indefinite delays. Once a district court judge accepts the premise, implicit in District Court Rule 22, that freedom of communication among members of the class is suspect, it becomes inevitable that any plaintiff requesting an exception must bear a heavy

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[17]As said in *NAACP v. Button,* 371 U.S. 415, 438, "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."

[18]District courts, following, or perhaps going beyond, the recommendations of the Manual, have restrained a state Attorney General from initiating communications with officers of a local governmental organization of the same state. See the *Cast Iron Pipe* antitrust case No. CA 71-516 (N.D. Ala.), order dated June 16, 1971, ¶ 6 (unreported). Where permitted to communicate, an Attorney General has been barred from doing so through associated private counsel, and otherwise restricted as to dealing with public agencies and municipalities within the state. See, In re Gypsum cases No. 46414 A AJZ (N.D. Cal.); Pretrial Order No. 29, dated June 25, 1971, ¶ 20 (unreported).

burden of proving that no conceivable harm can result, and inevitable also that the pressure of other demands upon the time of a busy judge may lead to delays having the practical effect of denial of meritorious requests. This is illustrated in this case by General Motors' contention that the District Court never decided whether any legally recognizable harm would result from the class plaintiffs' communicating with state Attorneys General, but merely did not wish to resolve that problem until a later stage in the proceeding. See, *supra*, p. 8, n. 10.

6. The importance of the issue presented in the instant case is underscored by the fact that Rule 22 as amended precisely follows the form which the Manual recommends for adoption by the district courts, either by way of general rule or by orders in particular cases. While we are not aware of other similar local rules, those recommendations have already led to a number of other district courts imposing restraints by orders similar in scope to Rule 22. The practice may become widespread among the district courts, unless this Court should make clear that compliance with this recommendation in the Manual violates First Amendment rights.

7. The Recommendation in the Manual extends to all class actions. The resulting burden upon initial class plaintiffs will vary with the nature of the litigation—depending on its inherent difficulties and the extent to which the necessary communications may have been anticipated and completed prior to instituting the class action. While the interest of *amici curiae* extends to class actions generally, we discuss the problem primarily in the context of antitrust cases, both because the instant case is an antitrust case, and because the bulk of the experience with the new concept that class action courts should exercise a broad censorship over communications with the class has been in antitrust cases.[19]

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[19]The *Albemarle Paper Company* case, *supra*, illustrates application to an employment discrimination case, where the ban upon initial plaintiffs communicating with fellow employees had the apparent

This Court has emphasized the high public purpose of private treble damage actions under the antitrust laws. As in *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495, 502 (1969):

> "As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition. See *Perma Life Mufflers v. International Parts Corp.*, 392 U.S. 134.

Violations of the antitrust laws by powerful combinations typically injure scattered consumers or small businessmen, and it is only by class actions that those affected can support the enormous expenditures of lawyers' time and energy necessary to prevail in these cases. See Loevinger, *"The Private Antitrust Action,"* 3 *Antitrust Bulletin* 167, 169-72. Cost of litigation may far exceed the amount of any one claimant's damages. See *Eisen v. Carlisle and Jacquelin*, 391 F.2d 555 (C.A. 2, 1968). To the extent that the ban imposed under District Court Rule 22 prevents effective use of the class action device, the consequence may be no relief at all for the typical consumer injured by an antitrust violation. Since a consumer class frequently includes state and local governmental authorities, enlisting the support of these authorities may be the only alternative to such total failure.

8. The further question of whether appeal or mandamus is the proper avenue of review does not go to the heart of the issues. If appeal is unavailable the alternative remedies are for that reason essential to avoid a serious impairment of plaintiffs' constitutional and procedural rights. Postponement of review until the conclusion of the litigation would leave no adequate opportunity to correct the error of the District Court, since there would be no way to eval-

effect of impeding the collection of evidence, without specific court order for each communication, although trial was scheduled to begin July 26, 1971 and the order was dated June 18, 1971.

uate and compensate for the resulting imponderable but substantial handicap to the effective prosecution of the class action.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

ORDER AMENDING RULE 22

IT IS HEREBY ORDERED that Rule 22 of the Civil Rules of this Court be, and the same is hereby amended to read as follows:

RULE 22. For Prevention of Potential Abuse of Class Actions.

In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel; or misrepresenting the status, purposes or effect of the action and orders therein.

ENTER:

FOR THE COURT

/s/ Edwin J. Robson
Chief Judge

June 15, 1971

LIBRARY
SUPREME COURT, U.S.

No. 70-244

In the

Supreme Court of the United States

OCTOBER TERM, 1971

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners.

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

PETITIONERS' REPLY BRIEF ADDRESSED TO BRIEF IN OPPOSITION OF GENERAL MOTORS CORPORATION and APPENDIX E

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-244

ROGER BOSHES, ESTHER K. ROERIG, CURTIS COLLUM, FRANK JACKSON and JAMES TAYLOR,
Petitioners,

vs.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,
Respondents.

PETITIONERS' REPLY BRIEF ADDRESSED TO BRIEF IN OPPOSITION OF GENERAL MOTORS CORPORATION and APPENDIX E

A. NEW MATTERS

Pursuant to Supreme Court Rule 24.5, we call the attention of this Court to certain new cases, to an amended rule of the District Court below and to other intervening matter not available at the time of the filing of the Petition for Certiorari on June 7, 1971.

The new matters are:

1. *The New York Times and Washington Post Cases.*

This Court took jurisdiction by certiorari in both of these cases on June 25, 1971, 403 U.S. ....., 91 S.Ct. 2270-1 and de-

cided them on June 30, 1971, 403 U.S. ....., 91 S.Ct. 2140. Both of these cases involve issues existing in the case at bar, (a) whether this Court would take jurisdiction by certiorari on judgments by the District Courts and Courts of Appeal *which were not final* (which this Court answered in the affirmative); (b) whether an injunctional order imposing a prior restraint upon communication on the basis of a Government allegation that prior restraint was necessary to protect the national interest in national security was permissible where the Government did not sustain its "heavy burden of showing justification for such restraint" (which this Court answered in the negative).

2. *Amended Civil Rule 22 of the District Court for the Northern District of Illinois.*

Civil Rule 22 was amended by the Judges of the District Court for the Northern District of Illinois on June 15, 1971, one week after the instant Petition for Certiorari was filed and served on the respondent District Judge. The amended Civil Rule 22 is set forth in GM's Brief in Opposition, (hereinafter called G.M. Brief), pp. 22-24.

3. *A communication of Chief Judge Robson of the District Court below to the Chicago Bar Association, dated June 24, 1971, in reply to a communication from the Chicago Bar Association to Judge Robson relative to Civil Rule 22.*

The original communication from the Bar Association to Judge Robson is referred to in the Petition for Certiorari, p. 21, N. 1, but was not available to petitioners at the time of filing the petition. Both communications are reproduced in Appendix E post, pp. 7a-14a and 15a-26a.

4. *Three orders of prior restraint against communications by plaintiffs and their counsel in class suits,* which

were entered in a 10-day period subsequent to the filing of this petition for certiorari, as follows:

June 16, 1971, Cast-Iron Pipe Cases, *Northern District of Alabama,* post, pp.* 1a-2a.

June 18, 1971, Moody v. Albemarle Paper Co., *Eastern District of North Carolina,* post, pp. 3a-4a.

June 25, 1971, Gypsum Cases, *Northern District of California,* post pp.* 5a-6a.

B. ARGUMENT

1. GM's Brief** argues that:

a) The District Court did not really make any ruling but only postponed ruling. (GM Brief, 5-6)

b) The District Court's order denying the motion for leave to communicate, consult and advise was not a "final decision suitable for review by way of certiorari". (GM Brief, 6)

c) The amendment of Civil Rule 22 "may have mooted the constitutional issues that Petitioners would raise." (GM Brief, 7)

d) Review by this Court of Civil Rule 22 is inappropriate because the rule was recommended by the Judicial Panel on Multidistrict Litigation, and because

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* Only material portions of the orders are printed.

** No Brief in Opposition has been filed by or on behalf of the Honorable William J. Campbell, District Judge, Respondent to the Petition for Certiorari in connection with the petitions for mandamus in the Court of Appeals; or by or on behalf of the District Court below, with relation to our attack by mandamus on Civil Rule 22, both as construed and applied, and on its face.

Copies of the Petition for Certiorari were served upon Judge Campbell and upon the Solicitor General. All the Judges of the District Court have taken note of the proceedings by way of appeal and mandamus in the Court of Appeals below, and have been advised of the filing of the Petition for Certiorari herein. (See Letter of Chief Judge Robson, post p. 23a.

District Courts had entered some orders modeled after the Judicial Panel recommended order, and one District Court in 1970 had adopted an analogous rule. (GM Brief, 8-10)

e) Petitioners should now go back to the District Court and resubmit their motion for leave to communicate, consult and advise without censorship (and presumably, if the District Court does not grant the motion, again seek review by way of appeal and mandamus). (GM Brief, 7)

2. General Motors' Brief does not dispute the assertions in the Petition for Certiorari that:

a) The District Court's denial of Petitioners' motion for leave to communicate, consult and advise with the Attorneys General of the States was a clear abuse of discretion (Pet. Cert. 3, 17); and was a denial of the First Amendment rights of communication, assembly and petition (Pet. Cert. 3-4), and of the Fifth Amendment right to due process (Pet. Cert. 4), of these Petitioners and the members of their class.

b) Civil Rule 22 is on its face a similar violation of such First and Fifth Amendment rights of Petitioners and the members of their class. (Pet. Cert. 19-22)

c) Civil Rule 22 is in conflict with four applicable lines of decision of this court. (Pet. Cert. 22-24)

d) This case is of great special intrinsic importance. (Pet. Cert. 24)

e) This case is of great and immediate public importance. (Pet. Cert. 24)

f) This case presents important questions of federal statutory and constitutional law which have not been, but should be, settled by this court. (Pet. Cert. 24)

g) The circumstances of this case call for the exer-

cise of this Court's power of supervision. (Pet. Cert. 24)

3. The District Court categorically by written order denied our motion for leave to communicate, consult and advise with the Attorneys General without submitting our communication in advance to the court (App. 44a). The court's remark in the colloquy that Petitioners would have leave to reinstate the motion after the ruling on the motion to strike the complaint was, of course, superfluous, since Petitioners could resubmit the motion at any time without leave. Moreover, counsel for Petitioners advised the court that they wanted to contact the Attorneys General while the motion to dismiss was pending "and before any decision one way or the other." The District Court refused. (GM Brief, 14)

Petitioners and their counsel have been (and still are) under the interdict of Civil Rule 22 since April 15, 1970. The Rule has already had a "marked impact on Petitioners' First Amendment rights" (*Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, note p. 418), since by the interdict and by the consequent inability to communicate, Petitioners have been seriously delayed in effective prosecution of the suit. Petitioners have no assurance that if resubmitted their motion would be granted; indeed, the amendment to Civil Rule 22, which we discuss *post* p. 7ff, shows that it will *not* be granted. (Cf. the observation of the Chief Justice, in *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, n. p. 418, that this Court was not given any indication that the Court below would have acted any differently on application for a permanent injunction.) Petitioners contend that Rule 22 is unconstitutional on its face so that there could be no question of fact on this point. Petitioners have no remedy unless this Court grants

certiorari, since the Court of Appeals denies any right to appeal, and mandamus is always uncertain.

4. The contention of GM that only "final decisions [are] suitable for review by way of certiorari" (GM Brief, p. 6) is without merit. In both *New York Times* (No. 1873) and *Washington Post* (No. 1885) 403 U.S. ....., 91 S.Ct. 2140, certioraris were granted to review interlocutory orders. In *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, certiorari was granted to review a State Court interlocutory injunction (over Mr. Justice Harlan's objection because there had not been a *final State Court* judgment.)* The Chief Justice resolved the question of jurisdiction in favor of vindicating First Amendment rights. *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, n. page 418. *General Motors itself has applied to this Court for and has been granted certiorari from a non-final judgment of a Court of Appeals. General Motors Corporation* v. *United States*, 323 U.S. 373, 377, explicated in *Gillespie* v. *U.S. Steel Corp.*, 379 U.S., 153.

Of course, under 28 U.S.C. 1254(1), this Court has plenary jurisdiction to take over *at any stage* by certiorari any case once docketed in a Court of Appeals. This jurisdiction is liberally exercised in the interest of justice and expedition. *Turner* v. *City of Memphis*, 369 U.S. 350, 353-354. At the last term of this Court, there were over 20 certioraris granted from judgments and orders that were not final.**

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* This objection does not exist here, *because this Court may review by certiorari interlocutory judgments of U.S. Courts of Appeals.*

** U.S. Bulk Carriers Inc. v. Arguelles, 400 U.S. 810; U.S. v. White, 401 U.S. 745; United Mine Workers v. Railey, 401 U.S. 486; Sierra Club v. Morton, 401 U.S. 907; Hawaii v. Standard Oil, 401 U.S. 936; U.S. v. Campos Serrano, 401

5. The amendment of Civil Rule 22 did not moot the constitutional issues;* indeed, it exacerbated Petitioners' grievance. The first sentences of both the original Rule and the Amended Rule are in substance identical:

ORIGINAL CIVIL RULE 22	*AMENDED CIVIL RULE 22*
"In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure,	"In every *potential* and actual class action under Rule 23, F.R.Civ.P.
no communication shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member who is not a formal party to the action	all parties are *hereby forbidden* directly or indirectly, *orally* or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action
until such time as an order may be entered by the court approving such communication."	without the consent of and approval of the communication by order of the Court." (Emphasis supplied)

** (Continued)
U.S. 936; Victory Carriers Inc. v. Law, 401 U.S. 936; S.E.C. v. Medical Committee for Human Rights, 401 U.S. 973; Childs v. Oregon, 401 U.S. 1006; U.S. v. Shields, 401 U.S. 1007; Reliance Electric Co. v. Emerson Electric Co., 401 U.S. 1008; Lauchli v. U.S., 402 U.S. 938; U.S. v. Zizzo, 402 U.S. 938; Chevron Oil Co. v. Huson, 402 U.S. 942; In re Pappas, 402 U.S. 942; Parisi v. Davidson, 402 U.S. 942; U.S. v. Pfizer, 402 U.S. 942; U.S. v. Holmes, 402 U.S. 969; S&E Contractors v. U.S., 402 U.S. 971; California Motor Transport Co. v. Trucking Unlimited, 402 U.S. 1008; N.Y. Times v. U.S., 403 U.S. ....., 91 S.Ct. 2140; Perry v. Sonderma, 402 U.S. ....., 91 S.Ct. 2226.

* A case will not be rejected because of supposed mootness in the ordinary sense where the public interest is involved, and
a) where the action of the court below sought to be reviewed is a continuing controversy, where the problem is "capable of repetition, yet evading review". *Moore* v. *Ogil-*

Thus the amended Rule *continues* the "universally abhorrent" total prior restraint, *continues* the "universally abhorrent" injunction against communication, and *continues* the "universally abhorrent" requirement for a license (i.e., a formal order of court approving the communication), and for censorship.

At this point the original Civil Rule 22 ended. It did not purport to limit the right of the District Court, in its discretion, to enter an order permitting written or *oral* communication, consultation and advice (as we requested).

6. Amended Civil Rule 22 *forbids (1) oral communication and (2) therefore, discussion.* It goes on to say (GM Brief 20):

> "Any such proposed communication *shall* be presented to the court *in writing,* with a designation or description of all addressees and with a motion and proposed order for prior approval by the court of the proposed communication and the proposed addressees." (Emphasis supplied.)

This is in clear conflict with the line of decisions culminating in *United Transportation Union* v. *State Bar of Michigan,* 401 U.S. 576 (see Pet. Cert. 22), which holds that the First Amendment gives persons the right to cooperate in helping and advising one another to act collectively by

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* (Continued)
vie, 394 U.S. 814-816. *Southern Pacific Terminal Co.* v. *Interstate Commerce Commission,* 219 U.S. 498, 515. *McGrain* v. *Daugherty,* 273 U.S. 135, 181-182; and/or
b) where as here it is assured that "the judiciary will have the benefit of deciding legal questions in a truly adversary proceeding, in which there is the "impact of actuality", and in which the contentiousness of the parties may be relied upon to bring to light all relevant considerations." *United States* v. *Johnson,* 319 U.S. 302, 304-305.

group legal action to obtain affordable and effective legal representation, and meaningful access to the courts. Petitioners' *oral speech* is no longer free and is barred by the Rule. Petitioners may only communicate *in writing,* by license, and after their proposed written communication has been approved by the court as censor. Private and confidential give-and-take discussion and mutual consultation are prohibited.

7. Amended Civil Rule 22 violates the "narrowest terms" and "vagueness" (Pet. Cert. 22) rules of applicable decisions of this Court. Thus, the amended Rule continues:

> "The communications *forbidden* by this Rule include *but are not limited to** (a) a solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; * * * and (d) communications from counsel or a party which *may* [*!*] *tend* [*!*] to *misrepresent* [*!*] the *status* [*!*], *purposes* [*!*] and *effects* [*!*] of the action, and of actual or *potential* court orders therein, which *may* [*!*] create *impressions* [*!*] *tending* [*!*], *without cause* [*!*] to *reflect adversely* [*!*] on any *party* [*!*], any counsel, the court *or the administration of justice* [*!*]." (Emphasis supplied.)

What could be more vague and fluid? How could vagueness be more compounded and treacherous? Not "misrepresent", not even "tend to misrepresent"; but "*may* tend to misrepresent"! What are meant by the phrases "status of the action", "purposes of the action", or of "potential"

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* The precise opposite of "narrowest terms" and "pinpointed objective"! *Carroll* v. *President and Commissioners of Princess Anne,* 393 U.S. 175, 183.

court orders? How could Petitioners do otherwise than guess at which is meant by "may [!] create impressions [!!] tending [!!!] without cause (?) to reflect adversely [!]" on General Motors, etc.? (Emphasis supplied.) Obviously, a good deal of what Petitioners assert and contend will be construed by General Motors to reflect adversely on it. If we have to apply to the court for a license to communicate, and to submit our proposed communication to the court for censorship, do we also have to satisfy the court that we have what the court deems "cause"? If the court thinks our showing of cause is inadequate, are we gagged? Is review by appeal or mandamus available?

This language in the Amended Rule violates Fifth Amendment due process. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. *United States* v. *Cardiff*, 344 U.S. 174, 176-177.

The foregoing injunctional language was entered *ex parte*. The request by the Chicago Bar Association to be heard was refused. (Letter of Chief Judge Robson, post pp. 23a-24a). It seems too obvious to require argument that the essential "balanced analysis and careful conclusions" do not exist. *Carroll* v. *President & Com'rs of Princess Anne*, 393 U.S. 175, 183. A rule "issued in the area of First Amendment rights must be couched in the *narrowest terms* that will accomplish the *pin-pointed* objective permitted by constitutional mandate and the essential needs of the public order." (Emphasis supplied.) *Carroll*, 393 U.S., 183.

Obviously, the foregoing language of the Amended Rule is in violation of the "narrowest terms" line of applicable decisions of this Court. (See Pet. Cert. 22).

8. It seems too obvious to require argument that the language quoted in paragraph 7 *supra* is in conflict with the line of cases which holds that the courts should not add

requirements to burden the private litigant beyond what is specifically set forth by Congress in the anti-trust laws. (Pet. Cert. 23)

9. Civil Rule 22 as originally adopted and as amended is in practical effect an injunction. The original rule (Pet. Cert. 9) contained no findings of fact purporting to meet the requirements for justification of an injunction. (See Pet. Cert. 23) The order of the District Court of June 15, 1971, adopting the Amended Rule, contains the following preamble (GM Brief 22):

> "In accordance with the unanimous action of all of the Judges of this Court in executive session on June 15, 1971, this Court finds that class actions under Rule 23, Federal Rules of Civil Procedure, are *subject to abuse* [!], intentional and inadvertent, unless procedures are devised and employed to *anticipate abuse* [!]. Among the *potential abuses* [!] of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; * * * and (4) unauthorized direct or indirect communications from counsel or a party, which *may* [!] *misrepresent* [!] the *status* [!], *purposes* [!] and *effects* [!] of the action and of Court orders therein, *may* [!] *confuse* [!] actual and potential class members, and create *impressions* [!] which *may* [!] *reflect adversely* [!] on the Court or the administration of justice. To *anticipate* [!] and prevent these abuses, this Court unanimously adopts the following order." (Emphasis supplied.)

It is obvious that this preamble does not find that litigants and their counsel in class actions under Rule 23 have in the past engaged in illegal conduct, and if not enjoined

will engage in such conduct (see Pet. Cert. 23); so that, treating the Amended Rule merely as an injunction, it is not supported by adequate (or indeed, *any*) findings.

10. *A fortiori:* To justify a prior restraint on First Amendment activity, it is not sufficient that the anticipated conduct be *merely* illegal. The "heavy burden of justification" imposed on Government (*New York Times*, 403 U.S. ....., 91 S.Ct. 2140, 2141, is higher by many orders of magnitude. The Government (here the District Court) must show by proof, not conjecture, surmise or conclusions, "a clear and present danger," overcoming "the very narrow right of the government to prevent", (Blackmun J. 403 U.S. ....., 91 S.Ct. 2140, 2165); a danger that "could clearly result in great harm to the nation"—"the death of soldiers, the destruction of alliances, the greatly increased difficulty of negotiation with our enemies, the inability of our diplomats to negotiate"; "prolongation of the war and of further delay in the freeing of United States prisoners." (403 U.S. ....., 91 S.Ct. 2140, 2166) Since danger of such magnitude, although asserted and documented, was not *clearly* shown in *New York Times*, this Court (and correctly, it now appears) gave preference to the First Amendment rights, and *rejected prior restraint. New York Times*, 403 U.S. ....., 91 S.Ct. 2140. How then can amended Rule 22 be defended, when it is sought to be justified, not on *facts* showing a clear and present danger of great harm to the national interest, but on conjectures, surmise and conclusions upon a hypothetical "anticipation" of "potential abuses?"*

* It is noteworthy that *the only experiential basis* cited by GM (Brief 8) to support the claimed need for "universally abhorrent prior restraint", and by the Multidistrict Panel (Manual for Complex and Multidistrict Litigation §161) is a remark by a District Judge in *Kronenberg*, 281 F.Supp. 622, 625 (1968) that a letter had been sent out by

11. The last paragraph of amended Civil Rule 22 creates a supposed exception to the amended Rule in "terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Construction Co.*, 269 U.S. 385, 391. This paragraph reads:

> "This rule does not forbid * * * (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not *have the effect of* [!] soliciting representation by counsel, or *misrepresenting* [!] the *status* [!], *purposes* [!] or effect [!] of the action and orders therein." (Emphasis supplied.)

This language does not really create an exception to or limitation on the previous impermissible catch-all. Communications occurring in the regular course of business, or in the performance of the duties of a public office or agency (such as the Attorney General) must still be

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* (Continued)
plaintiffs which irked the Judge because "inferences [!] might [!!] easily [!!!] be drawn from it which do not reflect [?] accurately the legal position of members of the class." (Emphasis supplied.) How frail a reed does colossal GM lean upon for support of its claim to gag these Petitioners!

The only previous case in point which we have been able to find squarely supports the right of a class suit plaintiff to solicit members of the class to come into the litigation. *Hormel* v. *U.S.*, 17 FRD 303, where Dimock, J. said, 17 FRD 304 "while the Government makes an assertion to the contrary, *I can see nothing wrong about the plaintiffs circularizing all others who have claims against the government.*" (Emphasis supplied) Judge Dimock cited no authority; apparently the question had never before been raised.

submitted to the court by motion in advance in writing for censorship and licensing by court order:

(1) if they might be construed to have the effect of soliciting representation by counsel; and/or

(2) if they might be construed to misrepresent [!] the status [!], purposes [!] or effect [!] of the action or court orders therein.*

Because of the vagueness of the language of amended Rule 22, every communication to a "public office or agency" which states the plaintiffs' view of the facts and/or the law, not previously censored and licensed by court order, will be subject to the charge by astute defense lawyers that it will have the effect of misrepresenting the status, purposes or effect of the action, and of orders therein. There is no room for inadvertence, error or difference of opinion. There is no room for give-and-take in oral discussion, or for brainstorming. The essence of effective mutual consultation is that strong opinions, highly partisan, quite possibly erroneous or inadequately supported, will be vigorously exchanged and argued in order to forge effective policy, strategy and tactics. (Compare, e.g., the private conferences of a multi-judge Court).

The Attorneys General are responsible men. They need no protection by "universally abhorrent prior restraint"

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* It is curious that "public office or agency" communications, as the amended Rule reads, would not seem to be forbidden even though they "may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court or the administration of Justice." *Quaere,* whether such communications to a "public office or agency" are permitted, not being forbidden, for the purpose of "solicitation of fees and expenses and agreements to pay fees and expenses," as distinguished from legal representation.

from being overreached by "solicitation of employment," or communications which might "have the effect of misrepresenting the status, purposes and effect of the action and orders therein." The Attorneys General are supremely capable of astutely making their own judgments as to what action should be taken by them in the interest of their States. There is no showing that any harm which might conceivably occur from improper unlicensed, uncensored communication could not be adequately redressed by the established after-the-fact processes.

12. Only unnecessary protraction, harm and damage could result from requiring these Petitioners to submit to the District Judge their motion challenging the constitutionality of the amended Rule. It is a re-enactment of the original Rule, with additional restrictions further and stringently limiting not only first amendment rights, but the District Judges' discretion too. The letter of Chief Judge Robson to the Chicago Bar Association (post, pp. 15a-26a) makes it perfectly clear that *all of the District Judges are in agreement, after considering the objections raised by the Chicago Bar Association* (post, p. 15a) *and by the Petition for Certiorari* (post, p. 23a) *that Civil Rule 22 as amended by their unanimous action* (post, pp. 15a, 16a) *is constitutional.* There is no disputed question of fact on our assertion of the unconstitutionality of the amended Rule on its face, which might be resolved differently on a resubmission. Therefore, reaffirmance of the considered judgment of all the District Judges that the amended Rule is constitutional will be no more than a formality. Compare the Chief Justice's observation in *Organization for a Better Austin* v. *Keefe,* 402 U.S. 415, n. p. 418:

> "[O]ur reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more

than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on Petitioners' First Amendment Rights."

CONCLUSION

The validity of amended Civil Rule 22, which is identical with the rule recommended to all the District Courts by the Multidistrict Panel, is a question of great immediate public importance, in view of the endemic entry of analogous "gag" orders which is now taking place all over the country (see post, pp. 1a-6a). It is ripe for examination and determination by the Court in this case.

Respectfully submitted,

ANTHONY BRADLEY EBEN
MILTON K. JOSEPH
CHARLES LIEBMAN
RAYMOND I. SUEKOFF
Attorneys for Petitioners

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APPENDIX E

Order entered in the *Cast Iron Pipe* cases, No. CA 71-516, in the Northern District of Alabama, on June 16, 1971 (Excerpt):

* * *

6. *Defendants' motion for order regarding communications to non-joined parties or potential parties.* Defendants' motion for an order regarding communications to non-joined parties is denied in part and granted in part, as follows: No retraction or corrective communication is due to be ordered at this stage regarding the past communications by the Attorneys General of Illinois and Pennsylvania—the effect of any improper solicitation or misleading advice can better be handled in notices under Rule 23 when the class action determinations have been made. All parties hereto are, however, hereby forbidden to communicate further (directly or indirectly, orally or in writing) with any potential claimant (whether as a member of a class under Rule 23 or as a subordinate agency or subdivision which may be by state law subject to representation by the Attorney General of such state) regarding any of the matters which may be involved in this litigation, without first having received the consent and approval of the proposed communication by order of the court. (A proposed communication shall be presented to the court in writing, with a designation or description of the proposed addressees and with a motion and proposed order for approval by the court, together with a certificate indicating the extent to which such communication has been examined by counsel for the other parties and effort made towards resolving objections thereto). This rule does not

forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed, or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which were not initiated by such office or agency and which do not have the effect of soliciting representation by counsel or misrepresenting the status, purposes or effect of the action and orders therein.

Order entered in *Moody* v. *Albemarle Paper Company*, Civil No. 989, in the Eastern District of North Carolina, on June 18, 1971:

In this case, as in all class actions, there exists the potential of abuse of the procedure, intentional and inadvertent, unless procedures are devised and employed to anticipate abuse. The judges of this court have under consideration an amendment to the local rules to guard against the potential abuses of the class action processes. Meanwhile, in order to avoid misunderstanding, the court on its own motion makes the following ruling with respect to the future conduct of counsel in this case, and it is

ORDERED:

All parties hereto and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning this action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication by order of this court. Any such proposed communication shall be presented to this court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this court of the proposed communication. The communications forbidden include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out of the action under subparagraph (b)(3) of Rule 23; and (d) communications from counsel or a party which may tend to mis-

represent the status, purposes and effects of this class action, and of any actual or potential orders herein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the courts, or the administration of justice. The obligations and prohibitions of this order are not exclusive, and all other ethical, legal and equitable obligations remain unaffected by the order. Neither does the order forbid communications between any attorney and his client, or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney.

Order entered in the *Gypsum* cases, No. 4614-A AJZ, in the Northern District of California, on June 25, 1971 (Excerpt):

* * *

19. All parties to these actions and their counsel are forbidden directly or indirectly, orally or in writing, to communicate concerning any such action with any potential or actual class member not a formal party to the action without the consent and approval of the proposed communication and proposed addressees by order of this Court. Any such proposed communication shall be presented to this Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by this Court of the proposed communication. The communications forbidden by this order include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, of the Federal Rules of Civil Procedure; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the class action, and of any actual or potential Court orders therein which may create impressions tending, without cause, to reflect adversely on any party, any counsel, this Court, or any administration of justice. The obligations and prohibitions of this order are not exclusive. All other ethical, legal and equitable obligations are unaffected by this order.

This order does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

20. An Attorney General or his staff (not through private counsel whom the Attorney General may associate) may contact public agencies and municipalities within his state for which he has the statutory duty to represent or protect, but he may merely inform them of the pendency of the action in which he is counsel; that it relates to gypsum wallboard; that, if they have an interest which they feel justifies intervention, they may seek to intervene through their own counsel or through the Attorney General, in which event a full disclosure of any fee arrangements which the Attorney General may have or proposes to have shall be made. Such representation of any public agencies or municipalities by the Attorney General will not be approved by the Court until it has examined the contractual fee arrangement which they have agreed upon. Nothing in this order shall limit or change the duties of the Attorneys General or their staff.

* * *

Chicago Bar Association Committee Report, submitted to Chief Judge Robson of the U.S. District Court for the Northern District of Illinois, asserting the incurable unconstitutionality of Civil Rule 22, and referred to on page 21, footnote 1, of the Petition for Certiorari:

March 8, 1971

Mr. Harry D. Lavery, Chairman
Federal Civil Procedure Committee
c/o Berger, Newmark & Fenchel
10 South LaSalle Street
Chicago, Illinois 60603

Dear Mr. Lavery:

Re: Local Rule 22

In accordance with your letter of February 11, 1971, we have prepared a report setting forth the basis for our opinion that local Rule 22 is unconstitutional.

Local Rule 22 of the Civil Rules for the United States District Court for the Northern District of Illinois, promulgated April 15, 1970, provides as follows:

> "*Rule 22. For Prevention of Potential Abuse of Class Action.* In every action brought as a class action under Rule 23 of the Federal Rules of Civil Procedure, no communication concerning such action shall be made in any way by any of the parties thereto, or by their counsel, with any potential or actual class member, who is not a formal party to the action, until such time as an Order may be entered by the Court approving the communication.
> "Attorneys will be required to comply with the provisions of Rule 39 of the General Rules of this Court."

It appears that local Rule 22 was inspired by suggested local Rule 7 contained in the Manual for Complex and Multi-district Litigation. A copy of suggested local Rule

7, together with the explanation for the suggested rule contained in the Manual, is attached to this report as Exhibit A.

I

We believe that local Rule 22 is unconstitutional as an overly broad prior restraint on the First Amendment right to freedom of speech. In *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968), the Supreme Court summarized the law in this area as follows:

> "Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgment.
>
> "The Court has emphasized that '[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (393 U.S. at 181.)
>
> "An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' [Citing case.] In other words, the order must be tailored as precisely as possible to the exact needs of the case." (393 U.S. at 183-84.)

In *Dorfman* v. *Meiszner*, 430 F. 2d 558 (7th Cir. 1970), our Seventh Circuit recently stated:

> ". . . in order to avoid a conflict between individual rights and the pursuit of valid government goals, restrictions on otherwise protected conduct must be drawn as narrowly as possible to conform to the 'letter and spirit' of the first amendment." (430 F. 2d at 562.)

The *Dorfman* case involved local Rule 34 of the General Rules, excluding photographers from certain portions of the Federal Building. The Seventh Circuit held that local Rule 34 was unconstitutionally overbroad and granted an injunction against the enforcement of the Rule as adopted. The Court stated that to impose a prior restraint by blanket rule "is inconsistent with both the letter and the spirit of the first amendment." (430 F. 2d at 563.)

In *Snyder* v. *Board of Trustees of University of Illinois,* 286 F. Supp. 927 (ND Ill. 1968), a three judge court invalidated a statute of the State of Illinois (the Clabaugh Act) prohibiting the use of facilities of the University of Illinois for the carrying on of certain types of activities by subversive, seditious and unAmerican organizations. The Court struck down the Clabaugh Act and issued a permanent injunction against its enforcement. The Court stated at page 934:

> "A statute purporting to regulate expression may not be so broad in its sweep as to hazard the loss or impairment of First Amendment freedoms by appearing to cover speech which may not constitutionally be regulated. Nor does it matter that the person challenging the validity of the statute might be subject to regulation under one more narrowly drafted."

Local Rule 22 seeks to prevent "potential abuses" of the class action device by a blanket rule that requires the District Judge in every class action to censor and approve (or disapprove), in advance, all communications with potential and actual class members. This approach seems to us to be both overbroad and unnecessary.

Any danger of unethical solicitation of business by lawyers can, we submit, be handled under existing ethical Canons. Canon 2 of the Illinois code of professional re-

sponsibility, as adopted on May 1, 1970, by the Board of Governors of the Illinois State Bar Association and by the Board of Managers of the Chicago Bar Association, covers the conduct of lawyers in soliciting employment with considerable precision. DR 2-104 provides as follows:

> "(A) A lawyer who has given unsolicited advice to a layman that he should obtain counsel or take legal action shall not accept employment resulting from that advice, except that:
>
> * * *
>
> (5) If success in asserting rights or defense of his client in litigation in the nature of a class action is dependent upon the joinder of others, a lawyer may accept, *but shall not seek* employment from those contacted for the purpose of obtaining their joinder." (Emphasis added)

Two points would seem to follow from the foregoing Canon. First, the conduct of lawyers in connection with solicitation of business in class actions has already been regulated in specific terms, and any conduct by a lawyer in seeking employment has already been expressly prohibited. Secondly, the Canon has been drafted very narrowly and has been specifically limited to the conduct of members of the legal profession. Needless to say, it is no answer to the constitutional problem to argue that Local Rule 22 was adopted "merely to insure high professional standards and not to curtail free expression", *N.A.A.C.P.* v. *Button*, 371 U.S. 415. A court, no more than a state or any other governmental body, may, "under the guise of prohibiting professional misconduct, ignore constitutional rights", *N.A.A.C.P.* v. *Button*, supra, 439.

As to the risk that a communication may confuse or mislead class members, the solution that comports with our tradition would seem to be more speech, rather than

prior restraint. The curative communications could, if necessary, be supervised by the court in the particular case in which the problem arose. Express authority for this expression is contained in Rule 23(d) of the Federal Rules of Civil Procedure, which provides that in class actions the Court may make appropriate orders requiring, for the protection of the members of the class, or otherwise for the fair conduct of the action, that notice be given in such manner as the Court may direct to some or all of the members of the class at any stage in the action.

Even in a particular case, of course, any prior restraint on freedom of speech must be narrowly drafted, and based on specific findings. The Seventh Circuit has enumerated the proper standard in an unpublished order entered May 1, 1970, in the case of *Chase* v. *Robson* (No. 18424, page 3 of order):

> "We hold that before a trial court can limit defendants' and their attorneys' exercise of first amendment rights of freedom of speech, the record must contain sufficient specific findings by the trial court establishing that defendants' and their attorneys' conduct is 'a serious and imminent threat to the administration of justice.'"

The Court continued in *Chase* v. *Robson* (at pages 4-5 of the order) as follows:

> "Even in the presence of sufficient justification for curtailing certain first amendment utterances, an order must be drawn narrowly so as not to prohibit speech which will not have an effect on the fair administration of justice along with speech which will have such an effect."

In *Ginsberg* v. *City of Miami*, 307 F. Supp. 675 (S.D. Fla. 1969), the court stated at page 676:

> "Freedom of expression is a sacred constitutional right which the highest court in the land has constantly protected. [Citing case.] Speech may not be restrained in advance except when there is clear and unmistakable determination that the speaker will violate the law in the course of his speech."

It may be argued that under local Rule 22, every Judge in the Northern District would be a benign censor who would interpret the rule narrowly so as to permit all communications not clearly improper. The same argument was made—and rejected—by the Seventh Circuit in *Dorfman*, where the Court stated:

> "Although the Government offers a narrow interpretation of Rule 34 and argues that its enforcement would be limited to such interpretation, 'we cannot assume that, in subsequent enforcement, ambiguities will be resolved in favor of adequate protection of First Amendment rights.'" (430 F. 2d 563 at n. 6.)

Utilization of court processes should not, and does not, justify a sweeping order preventing parties and their counsel from exercising their First Amendment rights free of prior governmental restraint. See *International Products Corp.* v. *Koons*, 325 F. 2d 403, 408 (2d Cir. 1963). Whatever power a trial judge may have in a given case to impose prior restrains [sic] on speech based on a particularized finding of need for such restraints in that case, it seems clearly unconstitutional to impose prior restraints by a blanket rule.

II

An additional question which has been raised by the Chairman's letter of February 11, 1971, referring this matter to our subcommittee, is whether there is a conflict between local Rule 22 and Rule 23 of the Federal Rules

of Civil Procedure. In view of our opinion that local Rule 22 is unconstitutional, we do not believe that it is necessary to take a position on the relationship between the two Rules.

We do wish to observe, however, that Rule 23 *requires* that notices be given to class members at various stages of a class action. Rule 23 is concerned with the danger of *lack* of communication with class members, whereas local Rule 22 is concerned with potential *abuses* in communication. The two Rules are concerned with quite different sets of problems, and we do not believe that local Rule 22 is in any way an implementation of Federal Rule 23.

III

In his letter of referral to this subcommittee, the Committee Chairman has requested an opinion as to whether modification of Rule 22 could correct the constitutional infringement referred to above. It is the conclusion of the subcommittee that the abuses, constituting an encroachment upon constitutionally guaranteed rights, cannot be corrected by employment of omitted language contained in Suggested Local Rule 7, or by modification of existing Rule 22. The same problems of overbreadth and prior restraint would continue to exist.

We recommend:

(1) That the Chicago Bar Association advise the Federal Judges of the Northern District of our views and request that the Rule be rescinded; and

(2) That the Judges be requested, prior to the adoption of any new local Rules, to make known the text of the proposed Rule and to give members of the Bar a

reasonable opportunity to express their views on such Rule.

Respectfully submitted,

SUBCOMMITTEE ON LOCAL RULE 22
/s/ Merrill A. Freed, Chairman
/s/ Edward R. Burr
/s/ Benjamin H. Cohen
/s/ Ronald M. Glink
/s/ Richard M. Kates

Letter from Chief Judge Robson of the District Court for the Northern District of Illinois to the President of the Chicago Bar Association, in response to the suggestion of the Bar Association in its Brief, that Civil Rule 22 of the District Court is incurably unconstitutional:

[Letterhead of]
UNITED STATES DISTRICT COURT
219 South Dearborn Street
Chicago, Illinois 60604

Chambers of
Chief Judge Edwin A. Robson

June 24, 1971

Mr. James A. Velde
President
The Chicago Bar Association
29 South LaSalle Street
Chicago, Illinois 60603

In re: Local Rule 22 of the United States District Court of Illinois.

Dear Mr. Velde:

I submitted your letter enclosing the report of the Federal Civil Procedure Committee pertaining to Local Rule 22 to our Judges for their consideration. As a result of your report, the Judges of our Court reexamined and amended the rule in question on June 15. A copy of the amended rule is enclosed. It is our opinion that this corrects a portion of the questions raised by the Committee. As to the other areas, we are of the opinion that the Committee misconceived the purpose of the rule and we are in substantial disagreement as to the constitutional questions.

As you will recall, a majority of the Federal Civil Procedure Committee of the Chicago Bar Association concluded Local Rule 22 to be incurably unconstitutional. The Committee report does not discuss basic contradictions peculiar to class action litigation, nor does it analyze relevant decisional authorities. Therefore, on behalf of the Court, I shall explain in some detail the rationale and constitutional basis of amended Local Rule 22.

I. *The Class Action Device**

The Supreme Court's revision in 1966 of Rule 23 of the Federal Rules of Civil Procedure substantially liberalized the class action device, which is now a species of litigation separate and distinct from the traditional lawsuit. In ordinary litigation, the attorneys normally represent specified clients who retained them. The typical class action, in contrast, is initiated by attorneys representing one or a few parties, who in turn purport to represent hundreds or thousands of absent class members that are nominal parties to the action. These absent class members are usually not contacted prior to filing the lawsuit and, in many instances, may not be consulted by anyone (the plaintiffs, the defendants, or the Court) until several months or years after the lawsuit is filed.

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* The discussion in Section I may seem elementary to those who are familiar with the class action device. Section I shows that (1) class actions create opportunities for serious abuse of the judicial process which are not normally present in routine litigation, (2) these potential abuses must, as a practical matter, be dealt with by rule rather than handled on a case-by-case basis, and (3) a rule requiring advance approval by the Court of communications with absent class members can be tailored specifically to protect against the abuses peculiar to class actions. Consequently, under the First Amendment authorities considered in Section II, such a rule would appear to be constitutionally permissible.

Rule 23 provides that, at some point in the litigation, the Court must determine whether the representative class members fairly and adequately represent the absent class members and, in most cases, must decide which of the absent class members should be properly included within the alleged class. Rule 23 further states that in most instances notice must be given to the absent class members, requesting them to indicate whether they wish to be included in the class. Rule 23 declares that the failure of an absent class member to respond to such a notice results in inclusion within the class.

As a consequence of the foregoing aspects of Rule 23 and other distinctive characteristics of class actions, communications in such suits from attorneys or representative class members to absent class members create opportunities for abuse of the judicial process not present in ordinary communications between an attorney and a client. As explained more fully in Sections 1.61 and 1.11 of the Manual on Complex and Multidistrict Litigation, these potential abuses, which may be unintentional, can be divided into two general categories: (a) solicitation of legal representation of absent class members and (b) misrepresentation or distortion of the status of the litigation.* See, for example, *Kronenberg* v. *Hotel Governor Clinton, Inc.*, 281 F.Supp. 622, 625 (S.D.N.Y. 1967), in which the absence of a rule similar to Local Rule 22 resulted in the attorneys for the plaintiffs sending an unauthorized communication to class members from which, according to that Court, "inferences . . . might easily be drawn . . . which do not reflect accurately the legal position of members of the class." The great potential for abuse is peculiar to

* Section 1.61 contains a fine discussion of the potential abuse of the class action which is not repeated in this letter.

class actions because in those cases, unlike traditional lawsuits, absent class members may not be aware of the lawsuit, the attorneys or the representative class members may wish to encourage absent members to participate in the lawsuit (for example, by sharing expenses), and the protagonists on both sides of the litigation will inevitably be affected by the absent class members' decisions to be included or excluded from the class. Thus, attorneys and parties in class actions have unusual incentives to communicate with absent class members. Unchecked communications with hundreds or thousands of potential clients or adversaries may, however, lead to potential abuse and thus threaten the integrity of the judicial process.

It is difficult, if not impossible, to deal with possible misuse of the class action device on a case-by-case basis since communications with absent class members often go undetected, especially if they are oral in nature. Moreover, it may not be possible to undo the effect of erroneous information or inaccurate statements communicated to class members, even if remedial communications are sent. An absent class member who is solicited may become a "satisfied" client or, is misled as to the nature of the litigation, the absent class member may refuse to read subsequent correspondence or my decide, once and for all, to opt in or out of the action. In *Siegel* v. *Chicken Delight, Inc.*, 271 F.Supp. 722 (N.D.Cal. 1967) and the Water Meter cases (*City of San Diego* v. *Rockwell Manufacturing Co., et al.*, No. C-50190-GHB and related cases (N.D.Cal. 1970)), the District Courts entered orders explicitly prohibiting parties and their counsel from independently contacting class members without prior court approval.

It would seem that the only effective way for the judiciary to cope with the potential abuses inherent in class actions is by a rule regulating the communications between

attorneys and representative parties, on the one hand, and absent class members on the other hand. It is eminently reasonable to require the substance of any such proposed communications to be submitted to the Court for approval prior to being transmitted to the absent class members, subject to the two qualifications discussed below in Section III.

II. *"Prior Restraints" and the First Amendment's Freedom of Speech*

The Chicago Bar Association's objection to Local Rule 22 is not justified by the cases it cites. While free speech may not be subjected to prior restraints in certain instances,* the decided cases clearly authorize prior restraints that are necessary to protect the integrity of the judicial process. As the Seventh Circuit recently declared in *Dorfman v. Meiszner*, 430 F.2d 558, 561 (7th Cir. 1970):

> "* * * [A] court may protect, by reasonable measures, the integrity of its proceedings from those interferences which may accompany the exercise of certain activities otherwise protected by the first amendment. *Sheppard* v. *Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Estes* v. *Texas*, 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Cox* v. *Louisiana*, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed. 2d 487 (1965)."

The preceding three Supreme Court decisions cited by the Court of Appeals are not considered by the Chicago Bar Association and, unlike the cases discussed in the Associa-

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* See, for example, the following decisions in which prior restraints on specified forms of speech were not permitted: *Carroll* v. *President and Commissioners of Princess Anne*, 393 U.S. 175 (1968) (inflamatory speech); *Ginsberg* v. *City of Miami*, 307 F.Supp. 675 (S.D.Fla. 1969) (obscene speech); *Snyder* v. *Board of Trustees of University of Illinois*, 286 F.Supp. 927 (N.D.Ill. 1968) (subversive speech).

tion's report, are directly concerned with striking a balance between First Amendment rights and the protection of the judicial process.

More specifically, in both *Sheppard** and *Estes* the Supreme Court approved the insulation of jurors from news reports or analyses of the trial in which they were participating. Some limitation on speech was recognized as being essential to the judicial process and the right to a fair trial and the due process of law.** Similarly, in *Cox* v. *Louisiana*, 379 U.S. 559 (1965), the Supreme Court held that a statute prohibiting picketing or parading near a courthouse with the intent of obstructing justice was justified by a legitimate state interest in protecting its judicial process.***

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* In *Sheppard*, in addition to reversing a conviction because of excessive prejudicial publicity from which the jury was not insulated, the Supreme Court held that the trial court had a duty to control the release of information to the press, including a proscription against extrajudicial statements by lawyers, parties, witnesses and officials. Thus, the Court specifically approved a prior restraint on speech where required to afford a fair trial. 384 U.S. at 359, 361.

** The Chicago Bar Association cites *International Products Corp.* v. *Koons*, 325 F.2d 403, 408 (2d Cir. 1963), for the proposition that utilization of court processes may not justify a prior restraint on free speech. The Second Circuit, however, there upheld the District Court's order restraining a party from disclosing information gained from a deposition, clearly a prior restraint on that party's speech.

*** The Court stated that:

> "* * * [T]his statute on its face is a valid law dealing with conduct subject to regulation so as to vindicate important interests of society and . . . the fact that free speech is intermingled with such conduct does not bring with it constitutional protection." 379 U.S. at 564.

Although the Chicago Bar Association relies extensively on language from *Dorfman* v. *Meiszner*, 430 F.2d 558 (7th Cir. 1970) (discussed above), its report overlooks the Seventh Circuit's recognition of the need to balance the various interests at stake. While the Court of Appeals in that case invalidated a few applications of Local Rule 34, the Court sustained the rule's underlying principle, explaining that:

> "* * * We think that the district court was acting within its discretion in prohibiting photographing and broadcasting inside as well as in the areas adjacent to the courtrooms. Moreover, the extension of the prohibition to the entire floor on which a courtroom is located, as well as the area surrounding the elevators on the first floor, is also permissible as a measure reasonably calculated to promote the integrity of the court's proceedings." 430 F.2d at 562.

The principle embodied in Local Rule 22, like that contained in Local Rule 34, merely subjects certain "speech" by attorneys and parties to reasonable regulation by the District Court. Rule 22 applies only to a limited group of communications, namely those in class actions, and its requirement of advance Court approval is tailored specifically to protect the integrity of the judicial process from the two potential abuses inherent in class suits: solicitation and misrepresentation. Subject to the qualifications discussed in Section III below, a very strong case can be made that Local Rule 22 satisfies all First Amendment guarantees.

III. *Amended Local Rule 22*

The major differences between Local Rule 22 as originally drafted and the amended rule suggested by the Judicial Panel are contained in the last paragraph of the latter rule, which states that:

> "This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein."

Thus, amended Local Rule 22 authorizes, generally, (1) communications by an attorney with absent class members, if the client or prospective client initiated the communications or the representation by the attorney, and (2) communications occurring in the regular course of business of public officials, so long as the communications constitute neither solicitation nor misrepresentation.

While Sections I and II above suggest that the Court may adopt a rule regulating communications in class actions, in neither of the *two* situations described in the last paragraph of amended Local Rule 22 is there a serious potential for solicitation or misrepresentation. Since Local Rule 22, as originally drafted, required Court approval of *all* communications, including those in these two areas, the Rule might be vulnerable to attack in this regard. In the Water Meter cases* and in two petitions previously filed

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* For example, in the Water Meter cases one of the plaintiffs' attorneys declared,

> "I do not see why the Mayor of Philadelphia should not be free to discuss his case with the Governor of Pennsylvania if he so desires," and "it [the Rule] prohibits us from talking to our own clients who have already retained us . . . and who are members of the class. . . . It also prohibits us from talking to the class members who may initiate communications with us to ask us to represent them."

with the Seventh Circuit,* the parties' attacks on the local rule in question and a similar order of another Court focused squarely on one or both of these two vulnerable areas.

It is interesting to note that the Committee Report does not focus upon the two areas of the original rule which have been raised in the course of class action litigation. Instead, the report states that the original rule cannot be modified to save its constitutionality. Since no basis is stated for this drastic conclusion, the Court would refer the Committee to the decisions cited in Section II above.

In conclusion, our Court at all times desires to cooperate with the Bar. Our past efforts clearly indicate this. However, regarding the request that we submit all rules to the Committee in advance of any adoption by the Judges of

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*The Chicago Bar Association's report neglects to state that validity of Local Rule 22, *as originally drafted,* has been twice challenged in the United States Court of Appeals for the Seventh Circuit. In *Roger Boshes, et al.* v. *General Motors Corporation,* Nos. 18939 and 18940 (unreported decision dated February 12, 1971), Judges Kerner, Pell, and Stevens dismissed the appeals of class action plaintiffs to declare Local Rule 22 null and void, and to expunge an order based upon that rule. On March 10, 1971, Judges Kerner and Stevens denied the petition of the plaintiffs-appellants for rehearing, or, in the alternative, to vacate the order of dismissal and to file a new order stating the reasons for dismissal of the appeals.

The plaintiffs-appellants also filed an original petition for writs of mandamus and prohibition to direct Judge William J. Campbell to vacate the order entered pursuant to Local Rule 22. *Roger Boshes, et al.* v. *Honorable William J. Campbell,* No. 71-1104. This petition was also denied without an opinion on February 12, 1971. The subsequent petition for a rehearing was denied by Judges Kerner and Stevens on April 8, 1971. The Court is advised that a petition for certiorari has been filed with the Supreme Court in these matters.

the Court, they are of the opinion that this would not be feasible. Many of the rules that we adopt are at the direction of the Judicial Conference of the United States. Some are as a result of study by the Federal Center for Judicial Studies, and others are based on the recommendation of the committees of Judges. It is therefore the conclusion of the Judges of this Court that, under the circumstances, we cannot agree to submit our rules in advance of their adoption. However, if, after they are adopted, there are any suggestions or recommendations to be made by the Committee of the Bar Association, we would be glad to consider them.

I wish to thank you and the Committee on Federal Civil Procedure for its time and effort in preparing this report.

My kindest personal regards.

Yours truly,

/s/ Edwin A. Robson

Enclosure

ORDER*

IT IS HEREBY ORDERED that Rule 22 of the Civil Rules of this Court be, and the same is hereby amended to read as follows: RULE 22. For Prevention of Potential Abuse of Class Actions.

> In every potential and actual class action under Rule 23, F.R.Civ.P., all parties thereto and their counsel are hereby forbidden, directly or indirectly, orally or in writing, to communicate concerning such action with any potential or actual class member not a formal party to the action without the consent of and approval of the communication by order of the Court. Any such proposed communication shall be presented to the

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* Note: In this letter from Judge Robson, the preamble to this order is omitted. It appears in the G.M. Brief, at p. 22. For convenience of reference, we repeat the preamble here:

> In accordance with the unanimous action of all of the Judges of this Court in executive session on June 15, 1971, this Court finds that class actions under Rule 23, Federal Rules of Civil Procedure, are subject to abuse, intentional and inadverent, unless procedures are devised and employed to anticipate abuse. Among the potential abuses of the class action processes are the following: (1) solicitation of direct legal representation of potential and actual class members who are not formal parties to the class action; (2) solicitation of funds and agreements to pay fees and expenses from potential and actual class members who are not formal parties to the class action; (3) solicitation by formal parties of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23; and (4) unauthorized direct or indirect communications from counsel or a party, which may misrepresent the status, purposes and effects of the action and of Court orders therein, may confuse actual and potential class members, and create impressions which may reflect adversely on the Court or the administration of justice. To anticipate and prevent these abuses, this Court unanimously adopts the following order.

Court in writing with a designation of or description of all addressees and with a motion and proposed order for prior approval by the Court of the proposed communication and proposed addressees. The communications forbidden by this rule, include, but are not limited to, (a) solicitation directly or indirectly of legal representation of potential and actual class members who are not formal parties to the class action; (b) solicitation of fees and expenses and agreements to pay fees and expenses, from potential and actual class members who are not formal parties to the class action; (c) solicitation by formal parties to the class action of requests by class members to opt out in class actions under subparagraph (b)(3) of Rule 23, F.R.Civ.P.; and (d) communications from counsel or a party which may tend to misrepresent the status, purposes and effects of the action, and of actual or potential Court orders therein, which may create impressions tending, without cause, to reflect adversely on any party, any counsel, the Court, or the administration of justice. The obligations and prohibitions of this rule are not exclusive. All other ethical, legal and equitable obligations are unaffected by this rule.

This rule does not forbid (1) communications between an attorney and his client or a prospective client, who has on the initiative of the client or prospective client consulted with, employed or proposed to employ the attorney, or (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel, or misrepresenting the status, purposes or effect of the action and orders therein.

Enter:

For The Court
/s/ Edwin A. Robson
Chief Judge

June 15, 1971

No. 70-244

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

ROGER BOSHES, et al.,

Petitioners,

v.

GENERAL MOTORS CORPORATION and the HONORABLE WILLIAM J. CAMPBELL, Judge of the United States District Court for the Northern District of Illinois,

Respondents.

On Petition for A Writ of Certiorari To the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT GENERAL MOTORS CORPORATION IN OPPOSITION

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ARGUMENT

This supplemental brief is submitted by respondent General Motors Corporation in response to the amici curiae's brief. It will show that the amici totally disregard the procedural posture of this case and that the amici base their arguments attacking Local Civil Rule 22 on a number of untested assumptions regarding the Rule.

The issue respecting Rule 22 was initiated by petitioners' motion which the District Court denied pending its consideration of respondent's previously submitted motion to dismiss the complaint. (Res. App. at 14; Pet. App. at 17a). Although the District Court has since ruled on the motion to dismiss, petitioners have purposively not refiled their motion as the District Court said they could do. (*Ibid.*) Moreover, Rule 22 has since been amended by the judges of the Northern District of Illinois to conform to a recommendation of the Judicial Panel on Multidistrict Litigation. (Res. App. at 22). Neither the original Rule, nor the amended Rule, has been passed on by either lower court. The record therefore contains no findings of fact or any crystalization of the issues, both of which are manifestly essential to sound review of the constitutionality of this or any other rule. *Alabama State Fed'n of Labor* v. *McAdory*, 325 U.S. 450, 460-461 (1945).*

Accordingly, the amici must couch their arguments in a factual vacuum and ignore that neither the District Court nor the Court of Appeals has had an opportunity to review the Rule or to determine the extent to which it applies to

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* Although respondent does not believe it timely to argue the merits of the amici's First Amendment contentions, it should be noted that the amici address themselves to the issue at large, barely acknowledging (Amici Br. at 9) the decisions of this Court, as well as the Courts of Appeals, which have struck a balance between the exercise of an individual's constitutional rights and the protection of the integrity of judicial proceedings as part of due process. See, *e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333 (1966); *Estes* v. *Texas*, 381 U.S. 532 (1965); *Cox* v. *Louisiana*, 379 U.S. 559 (1965); *Dorfman* v. *Meiszner*, 430 F.2d 558 (7th Cir. 1970). Whether and how that balance should be struck here surely deserves more reasoned treatment than the amici's cavalier approach to constitutional issues.

petitioners. In place of a proper factual and procedural framework, the amici make a number of assumptions regarding the Rule, all of which are apparently designed to put the Rule in the worst possible light, and they then conclude that the Rule is unconstitutional. (Amici Br. at 5). To consider constitutional issues in this fashion would be an unwarranted exercise in judicial speculation. In all events, this Court should not be the *first* tribunal to consider the constitutionality of the Rule or its application to petitioners. See *Bryan* v. *Austin*, 354 U.S. 933 (1957); *Asbury Hosp.* v. *Cass County*, 326 U.S. 207, 213-216 (1945).*

Nor can the amici's haste to have this Court consider hypothetically the constitutionality of Local Rule 22 be justified by their extraordinary plea that the Court "make clear that compliance with [the] recommendation [of the Judicial Panel on Multidistrict Litigation to District Courts that they adopt rules to prevent abuse of class actions] . . . violates First Amendment rights." (Amici Br. at 13). Any ruling as to the constitutionality of the Panel's recommended rule should be made in a conventionally developed judicial setting.

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* The absence of any ruling in either lower court explains why petitioners' reply brief, while colorful, is not particularly illuminating. Petitioners' reply brief also confuses the present case with cases where this Court has reviewed a lower court's interlocutory decision because such review was fundamental to the further conduct of the case. *E.g.*, *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945). That is clearly not the case here. Furthermore, in all instances where certiorari was granted to review an interlocutory order, including most recently *New York Times Co.* v. *United States*, 403 U.S. 713 (1971), the order reviewed was based upon a decision by the lower court on the merits of the issue involved. In this case, however, the lower courts have never held a hearing, received briefs, or ruled on the merits of any issue raised by petitioners' motion.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be denied.

Respectfully submitted,

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